

(29,608)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 325

AETNA LIFE INSURANCE COMPANY AND AETNA  
CASUALTY & SURETY COMPANY, PLAINTIFFS IN  
ERROR,

vs.

MRS. PEARL STONE DUNKEN, ADMINISTRATRIX OF THE  
ESTATE OF W. J. DUNKEN, DECEASED

IN ERROR TO THE COURT OF CIVIL APPEALS OF THE THIRD  
SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

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[Title omitted]

[fol. 1] **IN COURT OF CIVIL APPEALS**

**CAPTION**

Be It Remembered, that at a term of the Court of Civil Appeals of the Third Supreme Judicial District of Texas, begun and holden at the City of Austin, Texas, on the 2nd day of October, A. D. 1922, and ending on the First Monday in July, A. D. 1923, the following among other, proceedings were had, to wit:

No. 6492

**AETNA LIFE INSURANCE COMPANY OF HARTFORD, CONN., Appellant,**  
vs.

**Mrs. PEARL STONE DUNKEN, Administratrix, Appellee**

Appeal from District Court of McLennan County

Wednesday, November 15, 1922

Judgment Affirmed

[fol. 2] **CAPTION**

**THE STATE OF TEXAS,**  
*County of McLennan:*

At a term of the District Court for the Nineteenth Judicial District of Texas, begun and holden in the City of Waco, within and for McLennan County, at the Court House thereof on the 4th day of April 1921, and ending on the 2nd day of July, 1921, the honorable Prentice Oltoft, Judge, sitting in exchange with the regularly elected Judge James P. Alexander, present and presiding, the following cause came on for trial:

No. 23110

**Mrs. PEARL STONE DUNKEN, Administratrix,**  
vs.

**THE AETNA LIFE INSURANCE COMPANY OF HARTFORD**  
**IN 19TH DISTRICT COURT, McLENNAN COUNTY, TEXAS**

No. 23110

[Title omitted]

**PLAINTIFF'S 1ST AMENDED PETITION—Filed Dec. 23, 1916**

Now at this time comes plaintiff in the above entitled and numbered cause, and leave of the court being had for that purpose, files

this her first amended petition in lieu of her original petition filed herein on Sept. 8, 1916, and for such amendment would respectfully represent and show to the court:

## 1st

That plaintiff is the surviving wife of W. J. Dunken, deceased, who departed this life on or about June 1, 1916, and that plaintiff has duly qualified as administratrix of the estate of her said deceased husband and is authorized to prosecute this suit as such administratrix.

## 2nd

Plaintiff would further represent and show to the court that on or about January 28, 1911, the defendant was, and at this time is an insurance corporation, known as the Aetna Life Insurance corporation, of Hartford, Connecticut, duly incorporated under the laws of Connecticut, engaged in the business of writing life insurance in [fol. 3] the State of Texas for profit, in accordance with its permit to do business in said state.

## 3rd

Plaintiff says further that on or about said date, Jan'y. 28, 1911, in consideration of the annual premium of \$105.40 paid by the said W. J. Dunken, the defendant issued and delivered to plaintiff's husband, the said W. J. Dunken its policy of life insurance whereby defendant insured the life of her said husband, W. J. Dunken, in the sum of \$10,000.00, said policy being what is designated a term policy, and being numbered 98322. That by reason of the defendant company issuing and delivering said original policy it became bound and obligated to insure, and did thereby insure the life of the said W. J. Dunken in the principal sum of \$10,000.00.

## 4th

Plaintiff says further that said term policy, above referred to, contained a provision, in effect, granting the assured the privilege at any time within seven years from the date of same, of having said term policy converted into what is designated A Commercial Twenty Pay Life Policy for the same amount as said original policy, and further stipulating in effect that if same was converted within five years from date, it would not be necessary for the assured to stand another medical examination, but in case such conversion was not made until seven years after date then another medical examination would be necessary. Said original policy further provided in effect, that thirty days of grace should be allowed for the payment of each annual premium, so while said premiums fell due of the 28th of January of each year, yet the assured had until the 28th of the following Feby. to make such payments.

## 5th

Plaintiff says further that her said husband, W. J. Dunken, made payment of all annual premiums on said original policy up until Jan'y. 28, which continued said policy in good standing without any [fol. 4] further acts on the part of assured until Feby. 28, 1916. But plaintiff says that on Jan'y. 29, 1916, through its duly authorized agent and manager wrote the said W. J. Dunken, plaintiff's husband, requesting him to permit said term policy to be converted into a Commercial Twenty Pay Life Policy, and on Feby. 16, 1916, Defendant, through its said duly authorized agent and manager, again wrote plaintiff's husband requesting that he allow said policy to be so converted, inclosing a conversion form, or application for the assured to sign, requesting him to sign same, and also inclosing an extension note, requesting the assured to sign both, said application for conversion and extension note and return same to him, and in same letter stating to assured that the signing and returning of said extension note would give the assured two months from Jan'y. 28, 1916, before he would have to pay anything on the new premium (meaning the first premium on the policy into which said term policy was to be converted) And adding, "And then I can allow you to make only small partial payments along as usual." That in compliance with the request of defendant the assured did sign and return to the defendant both said application for conversion and extension note, for the purpose only as stated by defendant in its letter, Feby. 24, of protecting said term policy in the mean time in case there should be any delay in said conversion. That on Feby. 21st, at request of defendant, Assured sent to defendant said term policy, and that her husband signed every instrument defendant requested him to sign and did everything defendant requested him to do in order to keep said original policy in force until said conversion should be completed and said new policy become effective.

## 6th

Plaintiff says further that said extension note was for \$105.45, being the annual premium on said original term policy of \$105.45 with two months' interest at 6% added, and was dated Feby. 26, 1916, and was drawn to mature March 29, 1916. That according to the printed provisions of said extension note, the execution and delivery of same by the assured, would keep said original term [fol. 5] policy No. 98322, for \$10,000.00 in force until Mar. 29, 1916, and if not paid by said date, then said contract or policy No. 98322 would cease and determine, but plaintiff says that all of said provisions and conditions of forfeiture, for non payment of said note, as well as the provisions for forfeiture in policy for failure to pay said premium, were expressly waived by defendant, acting by and through H. B. Alexander, its duly authorized manager, in that it was expressly understood and agreed by the assured and defendant, acting through its said Manager, that said note was not to be paid at all, but the purpose of executing said note was to protect said term



policy No. 98322, in case there should be any delay in effecting the conversion of said policy No. 98322 into said Commercial Twenty Pay Life Policy for the same amount. Plaintiff says further it was contemplated and agreed by the defendant with W. J. Dunken, the assured, that after the conversion of said term policy No. 98322 for \$10,000.00 into said Commercial Twenty Pay Life Policy for \$10,000.00 was completed, that said new policy would have a loan value of \$1,050.00, and that defendant would then loan the said W. J. Dunken \$1,050.00 on said new policy, and the first premium on said policy would be deducted from the proceeds of said loan, and that the express purpose, intention and agreement of defendant with the assured was that the execution and delivery of said extension note would keep said term policy 98322 for \$10,000.00 in full force and effect until the Commercial 20 Pay Life Policy for \$10,000.00 should become effective, at which time said extension note should be cancelled and returned to the said W. J. Dunken, the assured.

## 7th

Plaintiff says further, as above set out, that at the urgent solicitation and request of Defendant, on Feby. 19th, 1916, the Assured signed and delivered to Defendant the Application for the conversion of his term policy No. 98322 for \$10,000.00 into a Commercial 20 Pay Life Policy for the same amount, and on Feby. 21, 1916, delivered to defendant his term policy 98322 for \$10,000.00 as urgently re-[fol. 6] quested by Defendant to be by defendant converted into said Commercial 20 Pay Life Policy for \$10,000.00 same to be dated back to Jany. 28, 1911, said term policy No. 98322 now in the possession of defendant, and it is hereby notified to produce same on the trial of this cause, or secondary evidence will be offered to prove its contents. That on Feby. 28, 1916, defendant did convert said term policy No. 98322 for \$10,000.00 into a Commercial 20 Pay Life Policy for \$10,000.00, giving said new policy, No. 152775, and on March 4, 1916, duly delivered said new policy for \$10,000.00 to plaintiff's husband, W. J. Dunken, payable to assured's executors or administrators, and that said new policy at once on delivery became effective, and policy 152775 hereto attached and made a part hereof.

## 8th

Plaintiff would further represent and show to the Court that on or about the 1st day of June, 1916 the said W. J. Dunken, departed this life, and that notice of his death was duly given to defendant as required by the term- of said policy, and that plaintiff offered to furnish proof of death, but defendant gave plaintiff to understand same was not necessary, and defendant denied its liability and thereby waived any further proof of death. That at the time of the death of said W. J. Dunken, said last named policy No. 152775 for \$10,000.00 was in full force and effect. But in case this Honorable Court should find that said last named policy No. 152775 for \$10,000.00, had not become effective, then plaintiff says that said term



policy No. 98322 for \$10,000.00 was still in full force and effect for it was distinctly understood and agreed by defendant with the assured that said term policy should remain in full force and effect until said Commercial 20 Pay Life Policy should become effective, that each of said policies is for the same amount \$10,000.00 and each is payable to the Administrator or executor of the assured, and that by reason of all of the facts as above set out the defendant became bound and obligated to pay to the administratrix of the estate of [fol. 7] W. J. Dunken, deceased, the said sum of \$10,000.00, less any indebtedness, if any, of the said W. J. Dunken to defendant.

9th

Plaintiff would further represent and show to the Court that, notwithstanding, the defendant became bound and obligated to pay to the Administratrix of the estate of W. J. Dunken, deceased, said sum of \$10,000.00, as above set out, and notwithstanding, plaintiff has made demand upon defendant for the payment of said amount, yet plaintiff says that defendant has wholly failed and refused to pay same, although long since due and payable, and that by reason of defendant's failure and refusal to pay said amount, plaintiff has been compelled to employ attorneys to bring suit to enforce the payment of said amount, by reason of which the defendant became liable to plaintiff for 12% of the amount of said policy as damages and reasonable attorney's fees in the sum of \$3,000.00.

10th

Premises considered, plaintiff prays that on final hearing hereof that she be permitted to recover of the defendant on policy No. 152775 the sum of \$10,000.00 less any indebtedness, if any, on said policy, and in the event the Court should find that policy No. 152775 has not become effective and a binding obligation against defendant, that then and in that event she be permitted to recover \$10,000.00 on policy No. 98322 less any indebtedness, if any, on this policy, and that in either event she recover 6% interest on said \$10,000.00 from 3rd day of July, 1916, the date when same became due, and also 12% of said amount of \$10,000.00 as damages, and for reasonable attorney's fees in the sum of \$3,000.00 and for costs, and for general and special relief legal and equitable, as her cause merits, as in duty bound she will ever pray.

Spell & Sanford, Forrester & Stanford, Attys. for Plaintiff.

[File endorsement omitted.]

[fol. 8] IN DISTRICT COURT, McLENNAN COUNTY, TEXAS

[Title omitted]

DEFENDANT'S AMENDED ANSWER—Filed Jan. 20, 1917

*Defendant's First Amended Original Answer*

Now comes the Aetna Life Insurance Company, of Hartford, Connecticut, defendant in the above entitled and numbered suit, and files this, its first amended original answer in amendment of and substitution for its original answer filed herein on the — day of —, 1916, as follows:

I

Defendant demurs to plaintiff's petition, and says that the same is insufficient in law, of which defendant prays judgment of the court.

II

Defendant denies, all and singular, the allegations of plaintiff, except such allegations as are herein expressly admitted, and of this puts itself upon the country.

III

For further answer defendant alleges as follows:

1. Heretofore, to-wit, on January 28, 1911, defendant issued to Wiley J. Dunken its policy of life insurance No. 98322, for the sum of \$10,000.00 known as a 7 years convertible term, non-participating policy, by which in consideration of the payment of an annual premium of \$105.40, payable annually in advance, defendant insured the life of said Wiley J. Dunken for a period of seven years, subject to the terms and conditions of said policy, the sum insured being payable to the insured's executors, administrators or assigns, less any unpaid portion of the premium for the current policy year, being the same policy of that date and number mentioned in plaintiff's petition.

2. Said policy No. 98322 provided in substance as follows:

"This policy shall not take effect until the first Premium hereon shall have been actually paid during the good health of the insured, a receipt for which payment shall be the delivery of the policy. [fol. 9] If any subsequent premium be not paid when due, then this policy shall absolutely cease; except that a grace of thirty-one days, during which time the policy remains in full force, will be allowed for the payment of any premium after the first, provided that with the payment of such premium interest at the rate of six per cent per annum is also paid thereon for the days of grace taken."

Defendant alleges that the premiums on said policy No. 98322 were paid for five years, but that the annual premium which became

due on January 28, 1916, (subject to the pays of grace as above stated) was never paid.

Defendant granted an extension for the payment of said premium until March 29, 1916, in consideration of a note for such premium and interest, due March 29, 1916, signed by the insured and providing, (with other provisions not material to mention), that "if this note is not paid when due said contract (Policy No. 98322) shall then cease and determine." Said note was not paid when due, nor has it ever been paid, in whole or in part; whereby said policy lapsed and ceased to have any further force or effect, as provided by the terms of the policy and said extension contract.

3. Said policy 98322 further provides as follows:

"This policy may upon any anniversary of its date be exchanged without medical re-examination for any level premium life or endowment policy then being issued by the company at the attained insuring age of the insured covering any hazard covered by this policy on payment of the premium required for such policy at the advanced age of the insured; or it may be exchanged for such a policy now issued by said company, which shall bear the same date as this policy and be issued at the same age, on payment of the difference between the premiums already paid hereon for an amount of insurance equaling that of the new policy and those that would have been required under the new policy with six per cent interest, provided in either case that the premiums required by such new policy shall be paid at the times stipulated for payment of premiums unless this policy, [fol. 10] that the issue of the new policy will not violate any law, that application for such new policy he made and this policy returned to the Home Office of said Company before default in the payment of premium and within five years from its date, that the amount of insurance shall not be increased or the premium rate per \$1,000.00 of insurance be less than that required by this policy, and that if such new policy is on the installment plan, the present value at the beginning of the installment period of all the installment payments required of the Company shall be considered the amount of insurance under such policy."

4. On, to-wit, February 19, 1916, while said policy No. 98322 was still in force, said Wiley J. Dunken, in accordance with his privileges as heretofore stated, made application to defendant to convert said policy No. 98322 into what is known as a 20 payment life commercial policy for \$10,000.00, to bear the same date as said original policy No. 98322, with an annual premium of \$277.70, the death beneficiary to be the same as in said policy No. 98322. In order to obtain such converted new policy it was necessary for said Wiley J. Dunken to pay the difference in premiums, with interest, as heretofore stated, and also to comply with provisions of such converted policy as provided by the original contract. Accordingly a converted policy No. 152775 was prepared by defendant, and signed by its proper executive officers, bearing date January 28, 1911—being dated back in accordance with said original contract 98322 and said

application for conversion—providing for the payment of an annual premium of \$277.70, payable annually in advance from the date of the policy, January 28, 1911, and containing other stipulations as hereinafter stated, and being the same policy of that number and date mentioned in plaintiff's petition.

5. Said policy 152775 provided in substance as follows:

"This policy shall not take effect until the first premium hereon shall have been actually paid during the good health of the insured, a receipt for which payment shall be delivery of the policy. If any subsequent premium be not paid when due then this policy shall cease, subject to the values and privileges hereinafter described; [fol. 11] except that a grace of thirty-one days, during which time the policy remains in full force, will be allowed for the payment of any premium after the first, provided that with the payment of such premium interest at the rate of six per cent per annum is also paid thereon for the days of grace taken; but for any reckoning herein named the time when a premium becomes due shall be the day herein stipulated therefor without grace.

"No renewal premium shall be considered paid, unless a receipt shall be given therefor bearing the original or lithographed signature of the Secretary or Assistant Secretary of this Company and countersigned by the agent."

6. Said policy 152775 also provided in substance as follows:

"After full three full years premiums have been paid hereon, before default in the payment of premium, and before the policy becomes a claim, the Company will loan upon the sole security of this policy at six per cent interest payable annually in advance the whole, or, at the option of the borrower, any part of the cash value shown by table A at the end of the current policy year, less all indebtedness to the Company hereon and less also any unpaid portion of the premium and interest on the loan for the remainder of the current policy year. For the purpose of such loan the policy shall be returned to the Company together with a proper assignment of the same and said assignment may be executed by the life beneficiary alone provided the interest of such beneficiary is not then assigned.

"If a request for the automatic premium loan privilege has been signed by the life beneficiary and assignee, if any, and is received at the Company's Home Office together with this policy before default in the payment of premium, such privilege will be endorsed thereon by the Company, and thereafter until a written revocation of said request signed by the life beneficiary and assignee, if any, has been endorsed hereon by the Company, the amount of any premium not paid in cash when due or within the days of grace [fol. 12] will, without further action by the owners, be loaned by the Company in payment of such premium and charged as an indebtedness secured by this policy, subject to interest at the rate of six per cent per annum as above described for loans, provided that the net loan value as above described is sufficient to pay the premium and interest then due."

Table A, referred to above, contains a statement of the loan value of the policy at different periods.

7. In order to consummate the transaction it was necessary for said Wiley J. Dunker to pay the additional or increased premiums and interest, or "conversion cost" amounting to \$1,020.88, and the premium for the year beginning January 28, 1916, amounting, with interest, to \$279.09, total \$1,299.97; and to enable said Dunker to make such payment, the Company proposed to loan the loan value of said policy 152775, which would amount, net, to \$987.00, leaving a balance of \$312.97 to be paid in cash by said Dunker to defendant. It was also necessary for said Dunker to surrender said original policy No. 98322, which he did, and, if he desired, to borrow on said policy 152775, it was necessary for him to deliver the same to defendant, together with his note for the amount borrowed, and with such other papers as would properly evidence the transaction, as provided by the contract.

8. Said policy 152775 contained a copy of said application for conversion, with a notice reading as follows:

"This copy of the Application should be carefully examined and if any error or omission is found the policy should be returned immediately to the Home Office of the Company for correction."

9. Said original policy No. 98322 was issued through the agency of defendant at Nashville, Tennessee, where said Wiley J. Dunker then resided. He afterwards moved to Texas, but the negotiations respecting the original policy, and its conversion to a new policy, and all other business affecting the matter, were conducted on behalf of defendant by its Nashville agent, through correspondence with said Dunker and J. A. Freeman, resident at Waco, Texas. [fol. 13] On March 4, 1916, H. B. Alexander, Manager of defendant's Nashville agency, mailed to said Wiley J. Dunker a letter (with the enclosures therein stated) which letter and enclosures were received by said Dunker in due course of mail, said letter reading in substance as follows:

"Nashville, Tenn., 3/4/16.

"Mr. W. J. Dunker,  
115 So. 5th St.,  
Waco, Texas.

DEAR MR. DUNKER:

I take pleasure in handing you herewith your \$10,000 Commercial Twenty Pay Life Policy, converted from seven year Term.

I also enclose a note which must be signed by you, with two witnesses to your signature, whose addresses should be given. Also please sign the form #378, which authorizes the Company to deduct the 1916 premium from the proceeds of the loan.

The amount due now to complete the transaction is \$312.97, which is determined as follows:



Conversion cost .....	\$1,020.88
1916 premium and interest .....	279.09
	1,299.97
Deduct net loan .....	987.00
	<hr/> \$312.97

Please do not fail to send me your policy when returning the above.

Thanking you, I remain, Sincerely yours,

(Signed) H. B. Alexander, Manager."

The policy enclosed with the foregoing letter was said policy 152775, upon which this suit is brought, and said policy was never in fact delivered to said Wiley J. Dunken, or to anyone in his behalf, except provisionally, in order that he might inspect the same, the delivery to become absolute only on payments of the premiums due, with interest, including what is designated as the "conversion cost," or the difference in premiums of the two policies from their date, [fol. 14] with interest, plus the premium on policy 152775 for the year beginning January 28, 1916, with interest, all amounting to \$1,299.97; it being the privilege of said Wiley J. Dunken either to pay said sum of \$1,299.97 in full in cash, and retain said policy, or to pay \$312.97 and borrow \$987.00, net on the security of said policy, returning the same to the defendant with his note and other papers as stated to complete the transaction.

Defendant alleges that the calculation made by defendant, as heretofore stated, was in fact correct; that neither said Wiley J. Dunken nor anyone in his behalf ever made any objection to such calculation, or to the form and substance of either of said policies, or to any other requirement or request of the defendant, although given ample opportunity to do so, and therefore said Wiley J. Dunken was and plaintiff is estopped to question the correctness and authority of defendant's acts in any of said respects.

10. Defendant alleges that all premiums paid on policy 98322 were fully earned, subject only to the option to convert said policy on the terms and conditions therein stated, as heretofore alleged; that said Wiley J. Dunken never complied with the conditions *precedent* necessary to put said policy 152775 into effect, either by paying or offering to pay said sum of \$1,299.97, or any part thereof, or by paying or offering to pay said sum of \$312.97, or any part thereof, and returning said policy 152775 to defendant with his note and other papers evidencing said proposed policy loan of \$987.00; that said policy 98322 completely lapsed because of non-payment of premium or premium note, and that said policy 152775 never went into effect, and was never in fact executed and delivered with the intention of its becoming effective, all of which was thoroughly understood at the time by defendant and said Wiley J. Dunken, the parties to the proposed contract, which was never in fact executed; and, if it shall



be held to have been executed, it was forfeited and lapsed because of non-payment of premium or premiums, as herein alleged; and defendant is, therefore, not liable for any amount on either of said policies, both of which had been abandoned by the said Wiley J. [fol. 15] Dunken before his death, which occurred on, to-wit, June 1, 1916.

11. Defendant alleges that each of said policies was prepared and signed by the proper executive officers of defendant at its home office in the City of Hartford, State of Connecticut; that said policy provides that the sum insured is payable at such home office when such amount becomes a valid claim; that each policy was sent from defendant's Home Office to its agency in Nashville, State of Tennessee, for delivery to said Wiley J. Dunken when he became entitled to such delivery; that when said Wiley J. Dunken applied for said policy 98322, and when said Wiley J. Dunken applied for said policy 98322, and when said policy was delivered to him he was a resident citizen of Nashville, Tennessee; and that, as heretofore stated, said policy 152775 was mailed from defendant's agency in Nashville, Tennessee, to said Wiley J. Dunken.

Defendant further alleges that under the laws of neither Connecticut nor Tennessee during the period covering the transactions herein involved was or is a life insurance company liable for more than it has expressly contracted to pay, with legal interest and ordinary court costs, even if it should in good faith fail to pay a valid claim within thirty days, or any other period, after demand made therefor, and therefore defendant says that the Texas Statute, R. S. Article 4746, has no application to the facts in this case.

12. For further answer defendant Pleads as follows:

(a) The original policy of life insurance, No. 98322, issued by defendant to Wiley J. Dunken, dated January 28, 1911, provided in substance, as follows:

"All agreements made by the Company are signed by its President, Vice-President, Secretary, Assistant Secretary or Treasurer. No other person can alter or waive any of the conditions of this policy, or make any agreements which shall be binding upon the Company."

The alleged policy No. 152775 also contains a provision substantially to the same effect.

Under a contract dated, to-wit, November 17, 1906, Lyle I. Burbank and Herman Bartlett Alexander, doing business under the firm [fol. 16] name of Burbank & Alexander, were appointed general agents of defendant for a portion of the State of Tennessee, to procure applications for life insurance for defendant in said territory, to receive premiums and deposits on all policies and gold bond contracts issued on such applications, and to collect premiums and deposits on all policies and gold bond contracts issued on such applications, and to collect premiums and deposits on renewals of the same. But said agents were not authorized to make, waive or alter

any contract of said Company, they having no authority as agents of said Company except as heretofore stated.

Thereafter said Burbank, by mutual consent, withdrew from said agency, which was continued by said Alexander alone, as agent of said Company, with the same authority that had previously been conferred on said firm of Burbank & Alexander, and no greater authority.

Referring now to various alleged letter- referred to in plaintiff's said pleadings, to-wit, an alleged letter from said Company's "duly authorized manager" to W. J. Dunken, dated January 29, 1916, and another letter date- February 16, 1916, and another letter dated February 24, 1916, and also referring to various other letters and telegrams allowed generally to have been written or sent by defendant's agent or agents, defendant says that each and all of said letters and telegrams, to the extent, if any, that they or any of them purport to be a waiver of any of the terms of said policy contracts, or either of them, or any modification of said contracts, or either of them, or the making of any new contract or contracts, or the extension of any credit or indulgence, were not executed by defendant, or by its authority, all of which defendant is ready to verify.

W. J. Moroney, Attorney for Defendant.

THE STATE OF TEXAS,  
County of Dallas:

I, W. G. Harris, hereby swear that I am an agent of the Aetna Life Insurance Company, of Hartford, Connecticut, a private corporation, and that the policy No. 152775, upon which this suit is brought, and the letters referred to in paragraph 12 of this answer, were not executed by defendant or by its authority, as in this answer more definitely alleged.

[fol. 17]

W. G. Harris.

Sworn to and subscribed by W. G. Harris before me this 17 day of June, 1917. J. C. Bird, Notary Public in and for Dallas County, Texas. (Seal.)

[File endorsement omitted.]

IN 19TH DISTRICT COURT, McLENNAN COUNTY, TEX.

[Title omitted]

PLAINTIFF'S 2ND SUPPLEMENTAL PETITION—Filed Jan. 20, 1917

Now at this time comes plaintiff and files this her second supplemental petition in lieu of her first supplemental petition in reply to defendant's Amended Original answer, and for reply:

## 1st

Excepts to defendant's said Amended Original Answer, and says the same is wholly insufficient in law to constitute any defense and of this she prays judgment of the court.

## 2nd

Plaintiff excepts specially to all the statements and matter in paragraphs from 3 to 11 inclusive wherein defendant pleads another policy, and other documents, and seeks to have same construed as a part of the contract herein sued upon, and plaintiff says same are insufficient and constitutes no defense, because policy contract No. 152775 herein sued upon, and referred to, and made a part of plaintiff's petition, as well as, the statutes of this State, Art. 4741 provide that, "this policy and the application herefor constitute the entire contract between the parties hereto, and it shall be incontestable from its date of issue except for non-payment of premium," etc. and of this plaintiff prays judgment of the Court.

## 3rd

Plaintiff excepts further specially to all that part of defendant's Amended Answer, in which it pleads as a defense, that policy No. [fol. 18] 152775, herein sued upon, and referred to, and made a part of plaintiff's First Amended Petition, was forfeited, or never became effective, because the cost of conversion was not paid, or loan papers were not signed and \$312.97 paid. And Plaintiff says all of said allegations constitute no defense, because said policy herein sued upon provides, as follows, "This policy and the application herefor constitute the entire contract between the parties hereto, and it shall be incontestable from its date of issue except for non-payment of premium, and that there is no provision that cost of conversion shall be paid or that \$312.97 must be paid or that loan papers must be signed and no provision that failure to do any one of said things shall prevent said policy becoming effective or be cause for forfeiting said policy, and of this plaintiff prays judgment of the Court.

## 4th

Plaintiff excepts further specially to all that part of defendant's Amended Answer in Pars. 7, 8, 9 and 10 in which defendant pleads that policy No. 152,775 was never delivered and therefore never became a binding obligation, because said policy provides that said policy shall "be incontestable from its date of issue except for the non-payment of premium, and as shown by the provisions of said policy, the question of delivery is immaterial, except in so far as by the terms of said policy, its delivery is made conclusive evidence of the payment, or waiver of pre-payment of the first premium, and of this plaintiff prays judgment of the Court.

5th

Plaintiff further excepts to all those allegations in paragraphs 4, 5, 6, 7, 8, 9 and 10 in which defendant seeks to plead that policy No. 152775 was never delivered and therefore never became effective, and says all of said allegations are immaterial and constitute no defense, because, the facts plead by defendant, as well as those plead by plaintiff, establish the delivery of said policy, and such delivery by the terms of the contract is made a receipt for the first premium, and estopps defendant from denying the validity of said contract.

[fol. 19]

6th

Plaintiff excepts specially, to the 11th paragraph of defendant's amended answer and says same is insufficient to show that the contract 152,775 is either a Connecticut, or Tennessee contract, because as shown by all the pleadings herein, the Assured at the time of the issuance and delivery of said contract was a citizen of this State, and said policy was delivered to him in this State, and is controlled by the laws of Texas, and of this Plaintiff prays judgment of the Court.

7th

Further pleading herein if the same be necessary, in reply to defendant's Amended Answer, Plaintiff denies all and singular the allegations in defendant's Answer contained and of this plaintiff prays judgment of the court.

8th

Further pleading herein by way of reply to all that part of defendant's Amended Answer in which Defendant alleges that policy No. 98322 lapsed and was forfeited for non-payment of the premium due Jan. 28, 1916, and the extension note given for said premium, due Mar. 29, 1916, plaintiff says that said policy was what was designated a term policy, the annual premium being \$105.40. That by the terms of said policy, the assured had the privilege at any time within seven years from its date of having it converted into what was known as a Commercial 20 Pay Life Policy for the same amount, the annual premium on which would be \$277.70. That the assured kept the annual premiums of \$105.40 paid up on said term policy for five years, or until Jan. 28, 1916, which with the thirty days of grace provided for in said policy was sufficient to keep same in good standing until *good standing until* Feby. 29, 1916, and the Assured would have continued to make the annual payments of \$105.40, as he had been doing for five years, but for the acts and conduct of the defendant, as will herein be set out, as follows: That beginning on Jan. 29, 1916, defendant, through its Manager, H. B. Alexander, requested the assured to permit the defendant to convert his term policy into a Commercial [fol. 20] Pay Life Policy, and on various dates thereafter defend-

ant, through H. B. Alexander, its said Manager wrote and wired the assured requesting him to permit defendant to convert said term policy as above stated, and sending the assured a blank application for conversion, and blank extension note and requesting the assured to sign said application for conversion and said blank extension note and that he return all of said papers together with his term policy No. 98322 to the defendant, for conversion into said Commercial 20 Pay Life Policy for the same amount, at the same time and in the same letters explaining to the assured that the defendant would fill out said blank note for the proper amount after it was signed by the assured, and returned to defendants said Manager at Nashville, Tenn. And at the same time and in the same letters explaining to the Assured that the only object in taking said extension note for \$105.40, the amount of the premium on the term policy No. 98322, with two months' interest at 6% added, was to secure more time within which to make a small payment, not on said note, but on the premium on the new policy into which said term policy was to be converted, and at the same time and in the same letters, explaining to the assured that said extension note was not to be paid, but that the only object in taking said note was, in case there should be any delay in the conversion to keep said term policy in force until the conversion was completed and the new policy became effective, at which time said extension note would be cancelled and returned to the assured. Plaintiff says further that the assured, yielding to the request of defendant's said manager, as above set out, and relying upon his statements and explanations as aforesaid, that said note was not to be paid, but that his signing said note would keep said term policy in full force and effect, until the new policy became effective, said assured signed said extension note on Feby. 19, 1916. Also the application for conversion and on said date returned said note, application for conversion, and said term policy No. 98322 to H. B. Alexander, defendant's Manager, at Nashville, Tenn. as he had been by said Manager requested to do, fully believing and relying upon the statements that said note would keep said term policy in full force and effect until the new policy became effective. Plaintiff says further that the premium on the old, the [fol. 21] term policy for the year beginning Jan'y. 28, 1916, was \$105.40, and that it was understood and agreed that it should be converted into a Commercial 20 Pay Life Policy and that the premium on this new policy should begin Jan'y. 28, 1916, and that said premium should be \$277.70 and that it was fully understood and agreed by and between the Assured and defendant, acting through H. B. Alexander, its said Manager, that said note representing the premium of \$105.40, with the two months accrued interest, was not to be paid at all, but that the execution and delivery of said note would keep said term policy in full force and effect during the negotiation for such conversion or until the conversion was completed and the new policy took effect, at which time said note was to be cancelled and returned to the Assured. Plaintiff says further that the course of the dealings of the defendant with the assured from the inception of said insurance contract in 1912 up until the



signing of said note on Feby. 19, 1916, was such as to lead the assured to believe and to rely upon defendant, not claiming a forfeiture for non-payment of said note when due; in that defendant through its said manager, H. B. Alexander, at the beginning of said insurance contract 98322, in 1912, professed great friendship for the assured, and permitted the assured to make a number of extension note- for each premium, not only on the policy but on another, for each year from 1912 to 1916, and always when a premium note was falling due, or after it was due, and unpaid would send the assured a blank renewal note to sign, and after it was signed and returned, said Manager would fill it in for the proper amount, and on some occasions said Manager would sign the assured's name to an extension note, and then carry said insurance on for the Assured until he could pay same. Plaintiff says further that the conduct of defendant, after the execution of the note of date Feby. 29, 1916 for the premium on policy No. 98322 for the year 1916, was in keeping with the understanding of the assured that said note was not to be paid, but was intended only to keep the old policy in force until it was converted and the new one became effective, and should [fol. 22] then be cancelled and surrendered, in that said note matured on March 30, 1916, and no notice of its maturity was ever given by defendant to the assured, no request or demand was ever made by defendant for its payment and no intimation ever given by defendant or any of its agents to assured, that defendant ever expected said note to be paid yet defendant had said note and was still holding said note at the time of the death of the assured on or about June 1, 1916.

Plaintiff says further that on Feby. 28, 1916, the defendant converted said old policy into the said new policy, giving said new policy number 152775 and marking said old policy, "Surrendered," and that on March 4, 1916, defendant unconditionally delivered said new policy and rendered plaintiff's said husband a statement charging her said husband with \$279.09, the same being the premium of \$277.70 on said new policy for the year beginning January 28, 1916 and 6 per cent interest on same from said date, January 28, 1916, until February 28, 1916, the date of said statement. And Plaintiff says further that if said new policy did not at once take effect on delivery and become effective that by the unconditional delivery of said policy, and by rendering said statement charging plaintiff's husband with said premium on said new policy from January 28, 1916, and by all that was said and done in connection with said attempted conversion, the defendant led her said husband to believe as he had a right to believe that defendant did not expect said note to be paid, and that by such conduct defendant is now estopped from claiming that said note should have been paid, and is estopped from claiming a forfeiture of said policy 98322, by reason of the non-payment of said note.

That defendant through its said Manager and other officers waived the payment of said note and thereby estopped the defendant from claiming a forfeiture by reason of non-payment of said note, and the Defendant Company through its vice president in converting and



unconditionally delivering the new policy and rendering said statement as above set out fully ratified and confirmed the acts of its said manager and other officers as above stated.

[fol. 23] Plaintiff says further, that by all the acts, conduct, statements and agreements of defendant, as above set out, defendant led the assured to believe, as he had a right to believe, that said note was not intended by the defendant to be paid, but that same was taken and held by defendant only for the purpose of keeping policy contract No. 98322 in force until it was converted and the new policy because effective, and having led the assured to so believe, and thus lulled him into a sense of security, the defendant thereby waived the provisions of forfeiture contained in said note and policy for the non-payment of said note, and defendant is now estopped from claiming that policy No. 98322, ceased and determined, or was forfeited for the non-payment of said note, or for failure to pay the premium on said term policy for the year 1916, and unless the conversion of policy 98322 had been completed and the new policy No. 152775 had become effective, then policy contract No. 98322, was in full force and effect and of this plaintiff prays judgment of the court.

9th

Further pleading herein by way of reply to paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 of defendant's amended answer, in which defendant contends that policy No. 152775 was never delivered, except conditionally, and that same was never executed and delivered, plaintiff says that policy contract No. 152775 herein sued upon provides that "this policy and the application herefor constitute the entire contract between the parties hereto and it shall be incontestable from its date of issue except for the non-payment of premium." The statutes of this state also provide, in effect, that, no policy of life insurance shall be issued or delivered in this state unless the same shall contain provisions substantially as follows: "3. A provision that the policy, or policy and application, shall constitute the entire contract between the parties and shall be incontestable not later than two years from its date, except for non-payment of premiums," etc. Art. 4741, Sec. 3, and plaintiff says that under the provisions of both the statutes of this state and the policy contract No. 152775 herein sued upon, the provisions of policy No. 98322 plead by defendant are immaterial [fol. 24] and constitute no part of contract 152775 herein sued upon, and as to whether the cost of conversion was paid or not, is immaterial, and because as provided by our statutes and also by policy contract 152775 herein sued upon, said policy is incontestable from the date of its issuance and receipt by the assured, except for non-payment of premium. Plaintiff says further, that even if the provisions contained in policy contract No. 98322 for its conversion were a part of policy contract No. 152775, which is not admitted, but expressly denied, yet plaintiff says the payment of the cost of the conversion is not a condition precedent to the taking effect of policy contract No. 152775, and that it is immaterial whether the cost of

conversion was paid or not, and that by the express terms of policy contract No. 152775, as well as No. 98322, it is made incontestable after date of issuance, except for non-payment of premium. Plaintiff says further that on Feby. 19, 1916, the assured at the request and under the direction of the defendant, signed the blank application for the conversion of policy No. 98322, and also the extension note for the purpose, only of keeping said policy in good standing until the conversion was effected, and on same date forwarded both of said instruments to defendant's manager, H. B. Alexander, at Nashville, Tennessee. And on Feby. 21, 1916, in response to a telegram from defendant's said manager, and at a time when policy No. 98322, according to its face, was as good as gold, and would continue so for more than a month, assured delivered to defendant's said manager said policy for conversion. Plaintiff says further that defendant's said manager, at Nashville, Tenn., forwarded said application for conversion, and said policy 98322, to defendant at its home office at Hartford, Conn. And that on Feby. 28, 1916, at a time when policy No. 98322, was as good as gold and at a time when according to the face of said policy and extension note, said policy would continue in full force for more than a month, defendant, by its proper executive officers converted said policy into a commercial 20 Pay. Life Policy, giving said new policy No. 152775, and marking said old policy No. 98322, "surrendered," and returned said new [fol. 25] policy No. 152775 to its manager of its Nashville Agency for delivery to the assured, and that on March 4, 1916, defendant through its manager of its Nashville Agency, without any condition or limitation delivered said policy to the assured and it became effective from its date, Feby. 28, 1916. Plaintiff says further that policy contract No. 152775, herein sued upon provides that "the delivery of said policy shall be a receipt for the payment of the first premium." That the first premium on Policy No. 152775, the same being for the year 1916, was paid by the assured, or its payment in advance was waived by the defendant, as is conclusively shown by the delivery of the said policy, and that defendant by delivering said policy, and by all that was said and done by defendant in the conversion of said policies, is estopped from denying the payment of said first premium, and thereby waived the prepayment of premium on policy No. 152775. That said policy contract No. 152775, by its delivery to the assured thereby conclusively established the payment of the first premium on same, became effective and incontestable from its date of issue Feby. 28, 1916, and said policy continued in full force and effect, and in the possession of the assured up to and including the day of his death, June 1st 1916, and of this plaintiff prays judgment of the court.

#### 10th

Further pleading herein by way of reply to the 11th paragraph of defendant's Amended Answer, plaintiff says that at the time her husband made application for policy No. 152775, and at the time said policy was issued and delivered to assured, that he was a resident and citizen of Texas, all of which was well known to defendant and

said policy was delivered to the assured in this state and while he was a resident and citizen of said state and defendant at said time was engaged in doing business in this state, and by reason of said facts said insurance contract No. 152775 was and is under Art. 4950 of our statutes a Texas contract, and governed by the laws of this state, which authorize the recovery of 12% damages and reasonable attorney's fees.

Wherefore plaintiff prays that she be permitted to recover as prayed for in her first Amended Petition.

SPELL & SANFORD,  
FORRESTER & STANFORD,  
*Attys. for Plaintiff.*

[fol. 26] [File endorsement omitted.]

IN NINETEENTH JUDICIAL DISTRICT COURT, McLENNAN COUNTY,  
TEXAS

[Title omitted]

DEFENDANT'S FIRST SUPPLEMENTAL ANSWER—Filed Jan. 13, 1917

Now comes the Aetna Life Insurance Company, of Hartford, Connecticut, defendant in the above styled cause, and files this its first supplemental answer in reply to plaintiff's first amended original petition and first supplemental petition, heretofore filed herein, as follows:

### I

Defendant demurs to plaintiff's said pleadings and says that the same are insufficient in law, of which defendant prays judgment of the Court.

### II

Defendant denies all and singular the allegations of plaintiff, and of this it puts itself upon the country.

### III

For further answer defendant pleads as follows:

(a) The original policy of life insurance No. 98322 issued by defendant to Wiley J. Dunken, dated January 28, 1911, provided in substance as follows:

"All agreements made by the company are signed by its President, Vice-President, Secretary, Assistant Secretary or Treasurer. No other person can alter or waive any of the conditions of this policy, or make any agreements which shall be binding upon the company."

The alleged policy No. 152775 also contain a provision substantially to the same effect.

Under a contract dated to-wit, November 17, 1906, Lyle I. Burbank and Harman Bartlett Alexander, doing business under the firm name of Burbank & Alexander, were appointed General Agents of Defendant for a portion of the state of Tennessee, to procure application for life insurance for defendant in said territory, to receive premiums and deposits on all policies and gold bond contracts issued on such applications, and to collect premiums and deposits on renewals of the same, but said agents were not authorized to make, waive or alter any contract of said Company, they having no authority as agents of said Company except as heretofore stated.

Thereafter said Burbank, by mutual consent, withdrew from said agency, which was continued by said Alexander alone, as agent of said Company, with the same authority that had previously been conferred on said firm of Burbank & Alexander, and no greater authority.

Referring now to various alleged letters referred to in plaintiff's said pleadings, to-wit: An alleged letter from said Company's alleged "duly authorized manager" to W. J. Dunken dated January 29, 1916, and another letter dated February 16, 1916, and another letter dated February 24, 1916, and also referring to various other letters and telegrams alleged generally to have been written or sent by defendant's agent or agents, defendant says that each and all of said letters and telegrams, to the extent, if any, that they or any of them purport to be a waiver of any of the terms of said policy contracts, or either of them, or any modification of said contracts, or either of them, or the making of any new contract or contracts, or the extension of any credit or indulgence, were not executed by defendant, or by its authority, all of which defendant is ready to verify.

W. J. Moroney, Attorney for Defendant.

THE STATE OF TEXAS,  
*County of Dallas:*

I hereby swear that I am agent of the Aetna Life Insurance Company of Hartford, Connecticut, and that the matters of fact alleged in the foregoing instrument are true.

W. G. Harris.

Sworn to and subscribed by W. G. Harris before me this — day of January, 1917. D. D. Bird, Notary Public, Dallas County, Texas. (Seal.)

[fol. 28] [File endorsement omitted.]

IN THE DISTRICT COURT OF McLENNAN COUNTY, TEXAS, NINETEENTH JUDICIAL DISTRICT, APRIL TERM, 1919

[Title omitted]

DEFENDANT'S TRIAL AMENDMENT—Filed Apr. 30, 1920

To the Honorable Court, aforesaid:

Now comes defendant in the above styled cause, and in response to the Court's ruling on demurrer by leave of court files this trial amendment to its answer herein, to-wit:

At the date of the alleged policies involved in this suit there was no statute or law in the State of Tennessee authorizing the recovery of any penalty or attorney's fees in a suit on a life insurance policy where liability is denied in good faith, nor has there been any such statute or law since said date; the only statute on the subject then or since in force in Tennessee being Chapter 141, Act of 1901, passed by the Legislature of the State of Tennessee and constituting a public act of said State, a copy of which act, marked Exhibit "A" is attached hereto and made a part hereof; the statute of the State of Connecticut constituting the public acts of said state, being then, and ever since, substantially the same as the law of Tennessee so far as liability of an insurance company for penalty and attorney's fees in a suit on a policy is concerned. The statute law of the States of Tennessee and Connecticut was as heretofore stated at the dates of the original applications for the alleged insurance policies involved in this case, and such has been the statute law of said states, constituting public acts of said respective statutes ever since; all of which defendant is ready to verify.

W. J. Moroney, Attorney for Defendant.

#### EXHIBIT A TO TRIAL AMENDMENT

*Penalty Imposed on Insurance Companies for Delay in Paying Losses*

Chapter 141, Acts of 1901

[fol. 29] An Act to Impose Additional Liability upon Insurance Companies and Other Corporations, Firms, or Persons for Failure to Promptly pay Insurance Losses and a Liability upon Policy Holders Where Suits are not Brought in Good Faith.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That the several insurance companies of this State, and foreign insurance companies and other corporations, firms, or persons doing an insurance business in this State, in all cases where a loss occurs and they refuse to pay the same within sixty days after



a demand shall have been made by the holder of said policy on which said loss occurred, shall be liable to pay the holder of said policy, in addition to the loss and interest thereon, a sum not exceeding twenty-five per cent on the liability for said loss; provided, That it shall be made to appear to the Court or jury trying the case that the refusal to pay said loss was not in good faith, and that such failure to pay inflicted additional expense, loss, or injury upon the holder of said policy; And, provided, further, That such additional liability, within the limit prescribed, shall, in the discretion of the Court or jury trying the case, be measured by the additional expense, loss, and injury thus entailed.

Section 2. Be it further enacted, That in the event it shall be made to appear to the Court or jury trying the case that the action of said policy holder in bringing said suit was not in good faith, and recovery under said policy shall not be had, said policy holder shall be liable to such insurance companies, corporations, firms or persons in a sum not exceeding Twenty-five per cent of the amount of the loss claimed under said policy; provided, That such liability, within the limit prescribed, shall, in the discretion of the Court or jury trying the cause, be measured by the additional expense, loss, or injury inflicted upon said insurance companies, corporations, firms or persons by reason of said suit.

Section 3. Be it further enacted, That all Acts and parts of Acts in conflict with this Act be, and the same are hereby repealed, and [fol. 30] that this Act take effect from and after its passage, the public welfare requiring it.

Passed April 16, 1901.

Approved April 18, 1901.

[File endorsement omitted.]

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IN THE DISTRICT COURT, McLENNAN COUNTY, TEXAS, 19TH  
JUDICIAL DISTRICT

[Title omitted]

CHARGE OF THE COURT AND VERDICT OF THE JURY—Filed Jan. 1,  
1921

GENTLEMEN OF THE JURY:

This cause is submitted to you upon what are called Special Issues, the same being questions of fact for you to determine from the evidence, and upon your answers taken in connection with the facts in the record which are uncontroverted, the court will apply the law and render judgment accordingly.

In passing upon the issues submitted, the jury are the exclusive



judges of the facts proved, the credibility of the witnesses and the weight to be given their testimony.

Special Issue No. 1.—Did the Agent of the Defendant insurance company deliver the new policy, No. 152,775, as a completed contract, with the intention that the same should become an effective and binding obligation from the time of receipt of same by the assured, W. J. Dunken? Answer "Yes" or "No."

Answer. Yes.

Special Issue No. 2.—If you have answered "No" to the first issue, you need not answer the second issue, but if you have answered "Yes" to the first issue, then answer this, the second issue:

Was the delivery of said policy as a completed contract acquiesced in by any executive officer of the defendant company? Answer: "Yes" or "No."

Answer. Yes.

Special Issue No. 3.—If you have answered "Yes" to the first and second issues, you need not answer the third, but if you have answered "No" to the first issue, or to the second issue, then you will answer the third issue, to-wit:

Did the defendant insurance company, under all the facts and circumstances in evidence before you in reference to both of said policies, waive its right to forfeit the old policy No. 98322, on account of the failure of the said W. J. Dunken to pay the extension note of \$105.40, dated February 29th, 1916, at the maturity of said note? Answer Yes or No.

Answer. —.

Special Issue No. 4.—From the evidence in this case, what amount do you find will be a reasonable attorney's fee for the services performed by plaintiff's attorneys in this case?

Answer. Three Thousand & No/100 (\$3,000 00) Dollars. The burden of proof under Special Issues Nos. 1, 2 and 3 rests upon the plaintiff. If you believe that the plaintiff has met such burden by a preponderance of the evidence, you will answer "Yes" to said issues; otherwise, you will answer "No" to same; this instruction being applicable to each of said issues separately.

Prentice Oltorf, Judge Presiding. James H. Dennison, Foreman of the Jury.

[File endorsement omitted.]

IN THE DISTRICT COURT, McLENNAN COUNTY, TEXAS, 19TH  
JUDICIAL DISTRICT

[Title omitted]

DEFENDANT'S OBJECTIONS TO COURT'S CHARGE—Filed June 1, 1921

[fol. 32] Now comes defendant in the above entitled and numbered cause, and in open court, before any charge is given to the

jury, and presents the following objections and exceptions to the charge of the Court, to-wit:

1. Defendant objects and excepts to the submission of Special Issue No. 1, because: (a) there is no evidence authorizing the submission of said issue, and (b) the personal intent of H. B. Alexander is wholly immaterial matter.

2. Defendant objects and excepts to the submission of Special Issue No. 2 because there is no evidence authorizing the submission of said issue.

3. Defendant objects and excepts to special issue No. 3, because there is no evidence authorizing the submission of said issue.

4. Defendant objects and excepts to the submission of Special Issue No. 4 because it is immaterial in that under the facts of this case, plaintiff is not entitled to recover attorneys' fees in any event, neither of the alleged policies involved in this case being Texas contracts.

W. J. Moroney, Attorney for Defendant.

Overruled. Prentice Oltorf, Judge Presiding.

[File endorsement omitted.]

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IN THE DISTRICT COURT, McLENNAN COUNTY, TEXAS, 19TH  
JUDICIAL DISTRICT

[Title omitted]

DEFENDANT'S SPECIAL CHARGE No. 1—Filed June 1, 1921

GENTLEMEN OF THE JURY:

You are instructed under the undisputed facts of this case, to return a verdict for defendant. The form of your verdict will be as follows: "Under the direction of the Court, we, the jury, find for the defendant. — — —, Foreman." This verdict should be signed by your foreman.  
[fol. 33]

— — —, Judge Presiding.

Defendant requests the court to give the jury the above special charge.

W. J. Moroney, Attorney for Defendant.

Refused. Prentice Oltorf, Judge Presiding.

[File endorsement omitted.]

IN THE DISTRICT COURT, McLENNAN COUNTY, TEXAS, 19TH  
JUDICIAL DISTRICT

[Title omitted]

DEFENDANT'S SPECIAL CHARGE No. 2—Filed June 1, 1921

GENTLEMEN OF THE JURY:

You are instructed that any act of H. B. Alexander, in personally providing for the payment of a premium, or in signing Dunken's notes, was the act of said Alexander personally, and not the act of Defendant Insurance Company, and you will disregard all evidence of any such acts in answering the issues submitted to you.

— — —, Judge Presiding.

Defendant requests the court to give the jury the above special charge.

W. J. Moroney, Attorney for Defendant.

Refused. Prentice Oltorf, Judge Presiding.

[File endorsement omitted.]

IN THE DISTRICT COURT, McLENNAN COUNTY, TEXAS, 19TH  
JUDICIAL DISTRICT

[Title omitted]

- DEFENDANT'S SPECIAL CHARGE No. 3—Filed June 1, 1921

GENTLEMEN OF THE JURY:

You are instructed that under the facts in this case, defendant's agent H. B. Alexander, had no authority to grant insurance, or [fol. 34] waive any condition of its policies or contracts, or make any agreement which shall be binding on defendant Company.

— — —, Judge Presiding.

Defendant requests the court to give the jury the above special charge.

W. J. Moroney, Attorney for Defendant.

Refused. Prentice Oltorf, Judge Presiding.

[File endorsement omitted.]

IN THE DISTRICT COURT, McLENNAN COUNTY, TEXAS, 19TH  
JUDICIAL DISTRICT

[Title omitted]

PLAINTIFF'S MOTION FOR JUDGMENT—Filed June 3, 1921.

Now, at this time, comes the plaintiff and moves the Court to enter the hereto attached judgment in favor of the plaintiff.

J. A. Stanford, Spell, Naman & Penland, Attorneys for the Plaintiff.

[File endorsement omitted.]

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IN DISTRICT COURT OF McLENNAN COUNTY

[Title omitted]

ORDER GRANTING PL'T'FF'S MOTION FOR JUDGMENT

On this the 11th day of June 1921, came on to be heard the motion of the plaintiff to enter judgment for the plaintiff in the above entitled cause, which said motion being duly heard by the court is by the Court in all things granted.

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IN THE DISTRICT COURT OF McLENNAN COUNTY, TEXAS, 19TH  
JUDICIAL DISTRICT

[Title omitted]

JUDGMENT

On May 30th, 1921, the above entitled and numbered cause was called for trial in its regular order. Both Plaintiff and Defendant appeared and announced ready for trial. Thereupon came a jury [fol. 35] of twelve good and lawful men consisting of James M. Dennison and eleven others, who after being duly sworn and impaneled and who after having heard the pleadings read, the evidence adduced and having received the charge of the Court and heard the argument of counsel retired to consider of their verdict and afterward, on June 1st, 1921, returned into open court the following answers to Special Issues submitted to them by the Court:

*Special Issue Number One*

"Did the agent of the defendant insurance company deliver the new policy Number 152775 as a completed contract with the in-

tention that the same should become an effective and binding obligation from the time of the receipt of same by the insured W. J. Dunken. Answer "Yes" or "No," to which the jury answered yes.

*Special Issue Number Two*

"If you have answered "no" to the first issue, you need not answer the second issue, but if you have answered "yes" to the first issue, then answer this second issue: Was the delivery of said policy as a completed contract acquiesced in by any executive officer of the Defendant company? Answer yes or no," to which the jury answered "Yes."

*Special Issue Number Three*

"If you have answered yes to the first and second issues, you need not answer the third, but if you have answered "No" to the first issue, or to the second issue, then you will answer the third issue, to-wit: Did the defendant insurance company, under all the facts and circumstances in evidence before you in reference to both of said policies, waive its right to forfeit the old policy No. 98332, on account of the failure of the said W. J. Dunken to pay the extension note of \$106.40, dated February 29th, 1916, due March 29th, 1916, at the maturity of the said note? Answer yes or no.

*Special Issue Number Four*

"From the evidence in this case, what amount do you find will be a reasonable attorneys' fee for services performed by plaintiff's attorneys in this cause?" To which the jury answered \$3,000.00.

(Signed) J. M. Dennison, Foreman of the Jury.

[fol. 36] And, it appearing to the court that the findings of the jury are supported by the evidence, it is the opinion of the court that said findings should be in all things approved and confirmed, and it further appearing to the court that W. J. Dunken died on or about June 1st, 1916, and the plaintiff, Mrs. Pearl Stone Dunken, the surviving widow, has duly qualified as administratrix of the estate of the said W. J. Dunken and that she is now the duly qualified and acting administratrix of said estate.

The Court further finds, based on the findings of the jury as above set out, that Policy Number 152775 issued by the defendant company, dated January 28, 1911, but actually issued February 28, 1916, all of which was by agreement between the insured and the defendant Aetna Life Insurance Company, which agreement is a part of the evidence introduced on the trial of the cause, for \$10,000.00 payable to the estate of W. J. Dunken, was in full force and effect at the time and prior to the death of said W. J. Dunken, deceased.

The court further finds that at the time of the death of the said W. J. Dunken that he was indebted to the defendant Aetna Life Insurance Company on said policy number 152775 in the sum of



\$1,299.97, which amount should be deducted from the face of said policy.

The court further finds, based on an agreement of counsel for both plaintiff and defendant, read in evidence herein that the amount due on the said policy became due and payable July 3rd, 1916, and that plaintiff made the statutory demand for the payment and in all things complied with the statute that entitled her — recover twelve per cent damages and reasonable attorney fees as a result of defendant's failure to pay said amount when due.

The Court further finds that at the time the policy Number 152775, sued upon her-in, was issued about February 28th, 1916, that the defendant, The Aetna Life Insurance Company, had a permit to do business in Texas and was in fact doing business in Texas on said date and the said W. J. Dunken, deceased, at said time was a resident of and residing in the State of Texas and that said policy was delivered to the said W. J. Dunken in the State of Texas.

[fol. 37] Wherefore, it is the opinion of the Court, based on the findings of the jury, supplemented by the findings of the court, as above set out, that the plaintiff, Pearl Stone Dunken, administratrix, is entitled to recover of the defendant Aetna Life Insurance Company Eighty-seven Hundred (\$8,700.00) Dollars as the balance of the principal of said policy, after deducting \$1,299.97 therefrom, and that plaintiff is also entitled to recover twelve per cent damages on said \$8,700.00, amounting to the further sum of \$1,044.00 and also plaintiff is entitled to recover six per cent interest on said \$8,700.00 from July 3rd, 1916 to this date, amounting to the sum of \$2,566.50, and that plaintiff is entitled to recover the full amount of \$3,000.00 as attorneys' fees, as found by the jury, making a total \$15,310.50.

It is therefore ordered, adjudged and decreed by the court that Plaintiff, Mrs. Pearl Stone Dunken, administratrix, of W. J. Dunken, deceased, do have and recover of and from the defendant, Aetna Life Insurance Company of Hartford, Connecticut, the sum of Fifteen Thousand, three hundred ten and 50/100 (\$15,310.50) Dollars together with six per cent interest on said amount from this day and that plaintiff also recover all costs herein incurred, for all of which let execution issue. To the entry of which judgment the defendant then and there excepted on the grounds stated in its bill of exception No. 4.

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IN THE DISTRICT COURT OF McLENNAN COUNTY, TEXAS, 19TH JUDICIAL DISTRICT

[Title omitted]

Now, at this time, comes the plaintiff and moves the court to enter the hereto attached judgment in favor of the plaintiff.

J. A. Stanford, Spell, Naman & Penland, Attorneys for the Plaintiff.

O. K. Prentice Oltorf, Judge Presiding.

IN DISTRICT COURT, McLENNAN COUNTY, TEXAS, 19TH JUDICIAL  
DISTRICT

[Title omitted]

[fol. 38] DEFENDANT'S AMENDED MOTION FOR NEW TRIAL—Filed  
June 20, 1921

*Defendant's Amended Motion for New Trial*

Now comes defendant in the above entitled and numbered cause and by leave of court files this its amended motion for a new trial, in amendment of and substitution for its original motion for a new trial filed herein on June 1, 1921, and moves the Court to set aside the verdict of the jury and the judgment of the court and grant defendant a new trial for the following reasons, to-wit:

1. The Court erred in refusing defendant's special charge No. 1 requesting the court to direct a verdict for defendant.

2. The court erred in overruling defendant's objections and exceptions to the submission of the first special issue submitted by the court, which objections and exceptions were as follows:

"Defendant objects and excepts to the submission of Special Issue No. 1 because (a) there is no evidencing authorizing the submission of said issue, and (b) the personal intent of H. B. Alexander is a wholly immaterial matter.

3. The court erred in overruling defendant's objections to the submission of the second special issue submitted by the court, which objections and exceptions were as follows:

"Defendant objects and excepts to the submission of special Issue No. 2 because there is no evidence authorizing the submission of said issue."

4. The court erred in overruling defendant's objections and exceptions to the submission of the third special issue submitted by the court, which objections and exceptions were as follows:

"Defendant objects and excepts to special Issue No. 3, because there is no evidence authorizing the submission of said issue."

5. The court erred in overruling defendant's objections and exceptions to the submission of the fourth special issue submitted by the court, which objections and exceptions were as follows:

"Defendant objects and excepts to the submission of Special Issue No. 4, because it is immaterial in that under the facts of this case [fol. 39] plaintiff is not entitled to recover attorneys' fees in any event, neither of the alleged policies involved in this case being Texas contracts."

6. The court erred in refusing defendant's special charge No. 2 reading as follows:

"You are instructed that any act of H. B. Alexander, in personally providing for the payment of a premium, or in signing Dunken's notes, was the act of said Alexander personally, and not the act of defendant Insurance Company, and you will disregard all evidence of any such facts in answering the issues submitted to you."

7. The Court erred in refusing defendant's special charge No. 3 reading as follows:

"You are instructed that under the facts in this case, defendant's agent, H. B. Alexander, had no authority to grant insurance, or waive any condition of its policies or contracts, or make any agreement which shall be binding upon defendant company."

8. The court erred in rendering judgment against defendant for statutory damages and attorneys' fees because the evidence conclusively shows that neither of the alleged policies of insurance involved in this case are Texas contracts, or governed by the Texas statutes authorizing the recovery of damages and attorneys' fees as therein provided; that said alleged policies are governed by the laws of the State of Tennessee (or if not, they are governed by the laws of the State of Connecticut); that under the laws of Tennessee and Connecticut no damages, penalty or attorneys' fees can be recovered under the facts of this case, and that to construe said Texas statute as applying to either of said policies would be in violation of the Constitution of the United States, and especially of Article 1, Section 10, prohibiting the passage of any law impairing the obligation of contracts, and of Article 40, Section 1, providing that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and of Section 1 of the Fourteenth Article of amendment providing that no state shall make [fol. 40] or enforce any law that shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty — without due process of law, nor deny any person within its jurisdiction the equal protection of its laws.

9. The verdict in answer to the first special issue is wholly without support in the evidence.

10. The verdict of the jury in answer to the second special issue is wholly without support in the evidence.

11. The court erred in each and all of its rulings as specially set out in defendant's bill of exceptions No. 4, in substance as follows:

IN DISTRICT COURT, McLENNAN COUNTY, TEXAS, 19TH JUDICIAL  
DISTRICT

[Title omitted] .

DEFENDANT'S BILL OF EXCEPTION No. 4—Filed June 20, 1921

Be it remembered that on the trial and proceedings in the above entitled and numbered cause, the following proceedings occurred:

When the plaintiff moved for judgment in said cause, defendant in open court and before said judgment was entered, objected and excepted generally to said proposed judgment, which judgment was actually entered by the Court, and specially objected and excepted to said judgment as follows:

(a) To the finding of the court that the findings of the jury are supported by the evidence, and that such findings should be in all things approved and confirmed.

(b) To the finding of the Court that policy No. 152775 was in full force and effect at the time and prior to the death of said W. J. Dunken, Deceased.

(c) To the finding of the court in substance that there was an agreement of counsel that plaintiff in all things complied with the statute that entitled her to recover 12% damages and reasonable attorney's fees, as a result of defendant's failure to pay said amounts when due, said agreement being in fact qualified, as shown by the evidence in the record, by the proviso in substance that such statute [fol. 41] is applicable to this case, there being no agreement that such statute is applicable.

(d) To the finding of the court that said policy was issued by the defendant and delivered to W. J. Dunken in the State of Texas.

(e) To the judgment for any amount whatever in favor of plaintiff.

(f) To the judgment for damages and attorney's fees, because (1) plaintiff not having recovered the full amount sued for, the statute is not applicable in any event, and (2) because the evidence conclusively shows that said policy, even if it is a completed contract, is not a Texas contract, or governed by the Texas statutes authorizing the recovery of damages and attorney's fees as therein provided; that said alleged policy is governed by the laws of the State of Tennessee (or if not, it is governed by the laws of the State of Connecticut); that under the laws of Tennessee and Connecticut, no damages, penalty or attorney's fees can be recovered under the facts of this case, and that to construe said Texas statute as applying to said policy would be in violation of the Constitution of the State of Texas, and especially of Article 1, Section 10, prohibiting the passage of any law impairing the obligation of contracts, and of Article 40, Section 1,

providing that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and of Section one of the Fourteenth Article of Amendment providing that no state shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law.

Which objections were severally overruled by the court, to which rulings of the court defendant then and there excepted, and prays that its exceptions be allowed and approved by the court and made a matter of record, which is accordingly done."

Wherefore defendant prays that said verdict and judgment be set aside and that defendant be granted a new trial.

W. J. Moroney, Attorney for Defendant.

[File endorsement omitted.]

[fol. 42]

[Title omitted]

#### ORDER OVERRULING MOTION FOR NEW TRIAL

On this the 20th day of June, 1921, came on to be heard in the above entitled and numbered cause defendant's amended motion for a new trial filed herein by leave of the court on the 20th day of June, 1921, in amendment of and substitution for defendant's original motion for a new trial filed herein on June 1st, 1921, and the court having heard and considered said amended motion, and being duly advised, it is ordered, adjudged and decreed by the Court that said amended motion for a new trial be and it is hereby overruled, to which ruling of the court defendants excepts and in open court gives notice of appeal to the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas.

Thirty days after the adjournment of this term of court are allowed for preparing, approving and filing bills of exception and statement of facts.

Prentice Oltorf, Judge Presiding.

IN DISTRICT COURT, McLENNAN COUNTY, TEXAS, 19TH JUDICIAL DISTRICT

[Title omitted]

DEFENDANT'S BILLS OF EXCEPTIONS 1 TO 3, INCLUSIVE—Filed June 20, 1921

Be it remembered that on the trial of the above entitled and numbered cause the following proceedings occurred, to-wit:



1. After the close of the evidence, and before any charge was submitted to the jury, defendant in writing requested the court to direct a verdict for defendant, as shown by defendant's special charge No. 1 filed herein, which special charge was then and there refused, to which ruling of the court defendant then and there excepted.

2. After the charge of the court submitting special issues was prepared by the Court and submitted to counsel, and before said charge was given to the jury, defendant in writing objected and excepted to said charge on the following grounds and for the following reasons [fol. 43] sons, to-wit:

(a) Defendant objects and objects to the submission of Special Issue No. 1, because (1) there is no evidence authorizing the submission of said issue, and (2) the personal intent of H. B. Alexander is a wholly immaterial matter.

(b) Defendant objects and excepts to special issue No. 2, because there is no evidence authorizing the submission of said issue.

(c) Defendant objects and excepts to special Issue No. 3, because there is no evidence authorizing the submission of said issue.

(d) Defendant objects and excepts to the submission of Special Issue No. 4, because it is immaterial in that under the facts of this case plaintiff is not entitled to recover attorney's fees in any event, neither of the alleged policies involved in this case being Texas contracts. Which objections and exceptions were then and there overruled by the court, to which action and ruling of the court defendant then and there excepted.

3. After the refusal of defendant's special charge No. 1, and after the overruling of defendant's objections and exceptions to the charge of the court, and before said charge was delivered to the jury, defendant in writing presented to the court -is special charges Nos. 2 and 3, which special charges were then and there refused by the court, to which action and ruling of the court defendant then and there excepted.

Said bills of exception are now approved by the court and ordered filed and made a part of the record.

Prentice Oltorf, Judge Presiding.

[File endorsement omitted.]

IN DISTRICT COURT, McLENNAN COUNTY, TEXAS, 19TH JUDICIAL DISTRICT

[Title omitted]

DEFENDANT'S BILL OF EXCEPTION No. 4—Filed June 20, 1921

[fol. 44] Be it remembered that on the trial and proceedings in the above entitled and numbered cause, the following proceedings occurred:

When the plaintiff moved for judgment in said cause, defendant in open court and before said judgment was entered, objected and excepted generally to said proposed judgment, which judgment was actually entered by the court, and especially objected and excepted to said judgment as follows:

(a) To the finding of the court that the findings of the jury are supported by the evidence, and that such findings should be in all things approved and confirmed.

(b) To the finding of the court that policy No. 152,775 was in full force and effect at the time and prior to the death of said W. J. Dunken, deceased.

(c) To the finding of the court in substance that there was an agreement of counsel that plaintiff in all things complied with the statute that entitled her to recover 12% damages and reasonable attorney's fees, as a result of defendant's failure to pay said amounts when due, said agreement being in fact qualified, as shown by the evidence in the record, by the proviso in substance that such statute is applicable to this case, there being no agreement that such statute is applicable.

(d) To the finding of the court that said policy was issued by the defendant and delivered to said W. J. Dunken in the State of Texas.

(e) To the judgment for damages and attorney's fees, because (1) plaintiff not having recovered the full amount sued for, the statute is not applicable in any event, and (2) because the evidence conclusively shows that said policy, even if it is a completed contract, is not a Texas contract, or governed by the Texas statutes authorizing the recovery of damages and attorney's fees as therein provided; that said alleged policy is governed by the laws of the State of Tennessee (or if not, it is governed by the laws of the state of Connecticut); that under the laws of Tennessee and Connecticut no damages, penalty or attorney's fees can be recovered under the facts of this case, and that to construe said Texas statute as applying to said policy [fol. 45] would be in violation of the Constitution of the United States, and especially of Article 1, Section 10, prohibiting the passage of any law impairing the obligation of contracts, and of Article 40, Section 1, providing that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other State, and of Section one of the Fourteenth Article of Amendment that no state shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law.

Which objections were severally overruled by the Court, to which ruling of the court defendant then and there excepted, and prays that its exceptions be allowed and approved by the court and made a matter of record, which is accordingly done.

Prentice Oltorf, Judge Presiding.

[File endorsement omitted.]

IN 19TH JUDICIAL DISTRICT COURT, McLENNAN COUNTY, TEXAS

[Title omitted]

APPEAL BOND—Filed July 1, 1921

Whereas, in the above entitled and numbered cause pending in the Court aforesaid, and at a regular term of said court, to wit, on the 1st day of June, 1921, the said Mrs. Pearl Stone Dunken, Administratrix of the estate of W. J. Dunken, deceased, plaintiff, recovered judgment against the said Aetna Life Insurance Company of Hartford Connecticut, defendant, for the sum of \$15,310.50, with 6% interest on said judgment from said date and all costs of suit, and

Whereas on the 20th day of June, 1921, defendant's motion theretofore filed was overruled, to which action of the court the said defendant then and there excepted and gave notice of appeal to the Court of Civil Appeals of the Third Supreme Judicial District of Texas, and from which judgment and order overruling said motion [fol. 46] for a new trial has taken an appeal to the said Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin.

Now, therefore, we, the Aetna Life Insurance Company of Hartford, Connecticut, as principal, and the Aetna Casualty & Surety Company as surety, acknowledge ourselves bound to pay to the said Mrs. Pearl Stone Dunken, Administratrix of the estate of W. J. Dunken, deceased, the sum of \$32,000.00, conditioned that the said Aetna Life Insurance Company of Hartford, Connecticut, appellant, shall prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against it, it shall perform its judgment, sentence or decree, and pay all such damages as said Court may award against it.

Witness our hands this 30th day of June, 1921.

Aetna Life Insurance Company of Hartford, Connecticut,  
Principal, By W. J. Moroney, Attorney. (Corporate Seal.)  
The Aetna Casualty and Surety Co., By R. R. Clark, Resident Vice President. M. B. Adams, Resident, Asst. Secretary.

I have fixed the probable amount of the cost of this suit in the Court of Civil Appeals, the Supreme Court and the Court below at \$200.00, and approved the foregoing bond this the 1st day of July, 1921.

R. V. McClain, Clerk of the District Court of McLennan County, Texas, By L. C. Rucker, Deputy.

[File endorsement omitted.]

## IN THE 19TH DISTRICT COURT, McLENNAN COUNTY, TEXAS

[Title omitted]

## BILL OF COSTS

[fol. 47]

*Clerk's Fees*

File and docket.....	.35
Citations .....	1.25
Copies of Petition.....	2.00
Appearances .....	.30
Bonds Approved (3).....	4.50
Swearing witnesses.....	2.00
Continuances .....	3.60
Swearing & Imp. Jury (3).....	1.05
Receiv. & Record. Verdict (3).....	1.05
File and Docket Motions (4).....	1.20
Files (49).....	7.35
Orders on Motions (4).....	3.00
Recording Returns .....	.50
Entering Judgments (3).....	5.00
Taxing cost and copy.....	.25
Transcripts 44, 40, 26.00, 33.15.....	103.55

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136.95*Sheriff's Fees*

Serving Citation.....	1.00
Jury Fee.....	.50

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1.50

Jno. J. Norton, Notary.....	10.50
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R. K. Barton, Steno.....	157.50
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" " " .....	52.20
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J. L. McAtee " .....	98.00
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## For Stenographic Reports.

Jury Fee.....	5.00
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Steno. Fee.....	3.00
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### Recapitulation

Clerk's Fees.....	138.95
Sheriff's Fees.....	1.50
Notary Fee.....	10.50
R. K. Marton, Steno.....	209.70
J. L. McAtee, ".....	96.00
Jury Fee.....	5.00
Steno. Fee.....	3.00
<b>Grand Total.....</b>	<b>462.65</b>

### CLERK'S CERTIFICATE

THE STATE OF TEXAS,  
County of McLennan:

I, R. V. McClain, Clerk of the District Court within and for the said county and state, do hereby certify that the above and foregoing pages from 1 to 51, inclusive is a true and correct transcript of all the proceedings had and done in cause No. 23110 Mrs. Pearl Stone Dunken, Administratrix, vs. The Aetna Life Insurance Company of Hartford, Connecticut, except the Statement of facts which ac-[fols. 48-50] companies this record, as all of same appears on file and of record in my office.

Witness my hand and seal of said court at office in the city of Waco on this the 6th day of July, 1921.

R. V. McClain, Clerk District Court McLennan County,  
Texas, By Myrtice Davis, Deputy. (Seal.)

[File endorsement omitted.]

IN THE DISTRICT COURT, MCLENNAN COUNTY, TEXAS, 19TH JUDICIAL DISTRICT, APRIL TERM 1921

[Title omitted]

### Statement of Facts

[fol. 51]

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IN THE DISTRICT COURT, McLENNAN COUNTY, TEXAS, 19TH JUDI-  
CIAL DISTRICT, APRIL TERM, 1921

[Title omitted]

Appearances:

For plaintiff: J. A. Stanford, Esq., Messrs. Spell, Naman & Pen-  
land.

For defendant: William J. Moroney, Esq.

Be it remembered, that upon the trial of this cause, begun the 30th  
day of May, A. D. 1921, the following facts, and none other, were  
introduced, to-wit:

*Plaintiff's Evidence in Chief*

## EXHIBIT No. 1

Introduction, by plaintiff, of Exhibit No. 1, being copy of the application made by the deceased, Wiley J. Dunken, for two policies of insurance on his life, one being No. 98321 and the other being No. 98322. This exhibit will be found attached at the end of the Seven Year Convertible Term Policy, Exhibit No. 2, on the following page.

## EXHIBIT No. 2

Introduction by plaintiff, of Exhibit No. 2, being copy of policy No. 98322, of the Aetna Life Insurance Company of Hartford, Connecticut, in the amount of \$10,000.00, as follows:

[fols. 52a & b] EVIDENCE: PLAINTIFF'S EXHIBIT No. 2

[Perforated:] Cancelled. Void.

*7-Year Convertible Term, Non-participating*

No. 98322. \$10,000. Age, 32 years

The Aetna Life Insurance Company of Hartford, Connecticut, hereby agrees to pay for the surrender of this policy at its Home Office the sum of Ten Thousand Dollars upon receipt of due proof of the death of Wiley J. Dunken, of Nashville, County of Davidson, State of Tennessee, (herein called the insured) during the continuance of this policy within the term of Seven Years from the date hereof; ending on the Twenty-eighth day of January, 1918, at five o'clock P. M.

This policy is issued and accepted subject to all the conditions, benefits and privileges described on the subsequent pages hereof, and which are hereby made a part of this contract.

In witness whereof the said Aetna Life Insurance Company has by its President and Secretary (or Assistant Secretary) signed this contract in the City of Hartford and State of Connecticut this Twenty-eighth day of January, 1911.

W. G. Bulkeley, President. — — —, Secretary. 612.  
1910.

[fol. 52c] 1. Consideration 2. Premiums, When Payable

The foregoing agreement is made in consideration of the application for this policy, which application is hereby made a part of this contract, and in further consideration of the Annual premium of One hundred, five and 40/100ths Dollars to be paid to the Company in advance at its Home Office or to its Agent at or before five o'clock P. M. of the Tweneyt-eighth day of January in each and every year for the term of Seven Years from the date hereof or until the prior death of the insured.

### 3. To Whom Payable at Death

The said sum insured shall be payable to the insured, —, executors, administrators or assigns, less any unpaid portion of the premium for the current policy year; and such payment shall be subject to the rights herein granted for varying the provisions of this policy, and to any indebtedness to the Company on account hereof.

### 4. Change of Beneficiary

The beneficiary above designated may be changed at any time, provided the policy is not then assigned by the insured and is then returned to said Company with a request for such change duly signed by the insured alone, and such change shall take effect on endorsement of the same hereon by the Company.

### 5. Premiums May be Paid Annually, Semi-annually, or Quarterly

The Company will accept the premium payable for annual, semi-annual or quarterly periods, according to the published rates for such at the time this policy is issued, provided that before any change is made from the method of payment herein stipulated the policy shall be forwarded to the Home Office of the Company for proper endorsement.

### 6. Conditions Regarding Payment of Premiums

This policy shall not take effect until the first premium hereon shall have been actually paid during the good health of the insured, a receipt for which payment shall be the delivery of the policy. If any subsequent premium be not paid when due then this policy shall absolutely cease; except that a grace of thirty-one days, during which time the policy remains in full force, will be allowed for the payment of any premium after the first, provided that with the payment of such premium interest at the rate of six per cent. per annum is also paid thereon for the days of grace taken.

[fol. 52d] No renewal premium shall be considered paid unless a receipt shall be given therefor bearing the original or lithographed signature of the Secretary or Assistant Secretary of this Company and countersigned by the agent.

### 7. Incontestable After One Year

This policy constitutes the entire contract between the parties hereto and shall be incontestable after one year from its date of issue except for non-payment of premium; but if the age of the insured has been misstated the amount payable hereunder shall be such an amount as the premium paid would have purchased at this Company's published rate now in use for the correct age.

### 8. Statements of Insured Not Warranties

All statements made by the insured shall in the absence of fraud be deemed representations and not warranties and no such statement shall avoid the policy or be used in defence to a claim under it unless it is contained in the written application herefor and a copy of such application is endorsed upon or attached to this policy when issued.

### 9. Suicide

If the insured shall commit suicide within one year from the date hereof, while sane or insane, this policy shall be null and void.

### 10. May be Exchanged for Insurance of Another Kind

This policy may upon any anniversary of its date be exchanged without medical re-examination for any level premium life or endowment policy then being issued by the company at the attained insuring age of the insured covering any hazard covered by this policy on payment of the premium required for such policy at the advanced age of the insured; or it may be exchanged for such a policy now issued by said company, which shall bear the same date as this policy and be issued at the same age, on payment of the difference between the premiums already paid hereon for an amount of insurance equaling that of the new policy and those that would have been required under the new policy with six per cent. interest, provided in either case that the premiums required by such new policy shall be paid at the times stipulated for payment of premiums under this policy, that the issue of the new policy will not violate any law, that application for such new policy be made and this policy returned to the Home Office of said Company before default in the payment of premium and within five years from its date, that the amount of insurance shall not be increased or the premium rate per \$1,000 of insurance be less than that required by this policy, and that if such new policy is on the instalment plan, the present value at the beginning of the instalment period of all the instalment payments required of the Company shall be considered the amount of insurance under such policy.

### 11. Reinstatement

If default occurs in payment of any premium hereon, and if this policy has not been surrendered, it may be reinstated in the same position as if such default had not occurred upon evidence of insurability satisfactory to the Company and by payment of arrears of premiums with interest at the rate of six per cent. per annum.

### 12. Modes of Paying the Insurance

If the policy is not assigned by the insured the insured may elect, or the payee (after the death of the insured without such election) may elect, by written notice filed with the Home Office of the Com-

pany, before any payment on the sum insured has been made, to have the net sum payable by the Company under this policy paid by one of the following modes in lieu of payment in one sum, provided the one sum to which every such payee would otherwise be entitled amounts to Five Hundred Dollars or more. Any mode of payment involving life instalments shall apply only to personal payees, the right of any payee contingent upon the death of a previous payee after the death of the insured, shall be only such of the instalments certain as remain unpaid at the death of the last previous payee, and any election shall take effect only upon an endorsement of the same hereon by the Company. The first instalment or annuity by either of these modes will be paid when the one sum becomes payable as hereinbefore provided, and the remaining instalments will be payable annually thereafter on the anniversary of the payment of the first instalment.

[fol. 52e] Under the third and fourth modes the attained age of any payee will be reckoned as that of the last birthday of such payee preceding the death of the insured and satisfactory evidence of the date of birth of the payee, or payees, must be furnished before the instalment payments commence.

### 13. Sum May Remain with Company at Interest

First. The payment annually in advance of three per cent. interest on the net sum payable, and the payment of the said sum at the death of the payee, less the unearned part of said interest, if any; and unless otherwise elected the payee may at the end of any interest year require the payment of the principal sum or any portion thereof.

### 14. Instalments for Limited Period

Second. The payment of equal annual instalments for a limited number of years. The amount of instalment for each one thousand dollars in the net sum payable is shown in Table B.

*Table B*

Number of annual instalments	Amount of each instalment
5.....	\$213.90
10.....	116.14
15.....	83.85
20.....	68.03
25.....	58.65
30.....	52.57
40.....	45.21

### 15. Instalments During Life

Third. The payment of equal annual instalments for a fixed period of twenty-five years and for as many full years longer as the payee



shall live. The amount of instalment for each one thousand dollars in the net sum payable is shown in table C opposite the attained age of the payee.

Table C

Age attained by payee	Amount of each instalment	Age attained by payee	Amount of each instalment
0.....	\$39.00	38	\$48.10
1.....	39.07	39	48.52
2.....	39.15	40	48.95
3.....	39.23	41	49.40
4.....	39.35	42	49.84
5.....	39.49	43	50.30
6.....	39.65	44	50.76
7.....	39.81	45	51.22
8.....	39.97	46	51.69
9.....	40.14	47	52.16
10.....	40.33	48	52.62
11.....	40.51	49	53.08
12.....	40.68	50	53.53
13.....	40.85	51	53.98
14.....	41.03	52	54.42
15.....	41.22	53	54.84
16.....	41.41	54	55.25
17.....	41.62	55	55.63
18.....	41.83	56	56.00
19.....	42.05	57	56.35
20.....	42.28	58	56.67
21.....	42.51	59	56.96
22.....	42.76	60	57.23
23.....	43.01	61	57.47
24.....	43.28	62	57.69
25.....	43.55	63	57.87
26.....	43.84	64	58.03
27.....	44.13	65	58.16
28.....	44.44	66	58.27
29.....	44.76	67	58.36
30.....	45.08	68	58.44
31.....	45.42	69	58.49
32.....	45.77	70	58.53
33.....	46.13	71	58.56
34.....	46.50	72	58.58
35.....	46.89	73	58.60
36.....	47.28	74	58.62
37.....	47.68	75	
		and over	58.65

## 16. Life Annuity

Fourth. The payment of equal annual instalments for as many full years as the payee shall live and no longer. The amount of in-

stalment for each one thousand dollars in the net sum payable is shown in Table D opposite the attained age of the payee.

Table D

Age attained by payee	Amount of each instalment	Age attained by payee	Amount of each instalment
0.....	\$40.00	43	\$54.11
1.....	40.00	44	54.88
2.....	40.00	45	55.74
3.....	40.00	46	56.63
4.....	40.10	47	57.57
5.....	40.23	48	58.58
6.....	40.37	49	59.67
7.....	40.55	50	60.83
8.....	40.73	51	62.07
9.....	40.93	52	63.37
10.....	41.15	53	64.77
11.....	41.37	54	66.27
12.....	41.60	55	67.84
13.....	41.84	56	69.54
14.....	42.09	57	71.38
15.....	42.35	58	73.31
16.....	42.63	59	75.36
17.....	42.90	60	77.58
18.....	43.16	61	79.94
19.....	43.42	62	82.44
20.....	43.67	63	85.11
21.....	43.96	64	87.95
22.....	44.25	65	90.91
23.....	44.54	66	94.07
24.....	44.86	67	97.28
25.....	45.19	68	100.70
26.....	45.54	69	104.17
27.....	45.89	70	107.76
28.....	46.27	71	111.48
29.....	46.66	72	115.21
30.....	47.06	73	119.05
31.....	47.48	74	122.85
32.....	47.92	75	126.58
33.....	48.36	76	130.21
34.....	48.80	77	133.87
35.....	49.29	78	137.36
36.....	49.78	79	140.85
37.....	50.28	80	144.51
38.....	50.84	81	148.37
39.....	51.41	82	152.44
40.....	52.03	83	156.74
41.....	52.69	84	161.29
42.....	53.38	85	
		and over	166.11

[fol. 52f] 17. How Payable After Death of Payee

Unless otherwise provided, any sum payable by the Company after the death of a payee under the first, second and third modes shall be payable to the executors, administrators or assigns of the payee.

18. Supplementary Contract

When this policy becomes a claim, if an election has been made requiring payment by annual instalments, the policy shall, if required by the Company, be surrendered and a supplementary contract issued for the mode of payment elected.

19. Commutation of Instalments

Unless otherwise elected the payee or payees under the second and third modes, may at any time surrender the contract for the commuted value of the instalment payments yet to be made, computed upon the same basis as the computations in the second mode, provided that no such commutation will be made under the third mode except after the death of the payee or payees occurring within the aforesaid twenty-five years.

20. Does Not Participate

This policy shall not be entitled to share in the surplus earnings of the Company.

21. Assignments

A duplicate of any assignment of this policy shall be filed at the Home Office of the Company, but in no case does the Company guarantee the validity of an assignment, and any claim against said Company arising under this policy, made by an assignee, shall be subject to proof of interest.

22. All Agreements Must be Signed by an Executive Officer

All agreements made by the Company are signed by its President, Vice-President, Secretary, Assistant Secretary or Treasurer. No other person can alter or waive any of the conditions of this policy, or make any agreement which shall be binding upon the Company.

[fol. 52g & h] EVIDENCE: PLAINTIFF'S EXHIBIT No. 1

Form No. 1, Application, Edition June, 1907

Page 1

*Copy of the Application*

If any error is found in the statements and answers of the applicant, note the same and return the Policy to the Home Office of the Company, for correction.

Form No. 1, Application, Ed. April, 1910

Executive Officers: President, Vice-President, Secretary, Asst.  
Secretary, Treasurer

Page 1

I hereby apply to the Aetna Life Insurance Company for a contract of insurance upon my life, and I do hereby declare that I am in sound health and have no disease or ailment not fully set forth herein; that the statements and answers herein made and signed by me are complete and true, and I agree that they shall form a part of the contract or policy issued by said Company upon my life. I further agree that no statement or declaration made to any agent, examiner, or any other person, and not contained in this application, shall be taken or considered as having been made to, or brought to the notice or knowledge of, said Company, or as charging it with any liability by reason thereof. I also acknowledge that all policies and agreements made by said Aetna Life Insurance Company are signed by one or more of its executive officers, and that no agent or other person not an executive officer can grant insurance or waive any condition of its policies or make any agreement which shall be binding upon said Company. Use good black ink only.

1 a. What is your name? (Write Plainly Christian name in full.) Wiley Jamerson Dunken.

b. What is your present occupation or employment? If more than one state all. (If a clerk, salesman, merchant, manufacturer, mechanic or laborer, state class of goods sold, manufactured or handled.) Commercial Salesman.

2. Do you contemplate changing your occupation, or traveling or residing south of the 32d degree, or north of the 60th degree of north latitude? If so, state particulars. No.

3 a. In what employments have you heretofore been engaged? Same for several years.

b. Have you been, or are you now, employed in the Army or Navy? No.

c. Are you, or have you ever been connected with the manufacturer or sale of malt or spirituous liquors? If so, when, and how? No.

4. a. What is the place and date of your birth? Sherman, Texas; Year, 1878; Month, Sept.; Day, 6.

b. What is your age next Birthday? 33 Years.

c. Are you married? Yes.

5 a. Where do you reside? (Street and Number) 3104 Dudley

b. What is your business address? 8 Noel Block, Nashville, Davidson, Tenn.

6 a. What kind of a policy is desired? \$10,000 Twenty Payment Life Commercial Policy, 10,000 7 year Convertible Term, Date policies Jan. 28, 1911.

b. Amount of Insurance Twenty Thousand, \$20,000.00.

c. Shall the premiums be payable during the whole term of Policy? No, Yes.

d. If not, during how many years shall the premiums be payable?

e. Premium, \$384.20, Annually; \$—, Semi-Annually; \$—, Quarterly.

If a Participating Policy, the dividends unless otherwise requested shall reduce premiums or be paid in cash.

7. What is the Name, Residence, and Relationship of the person to be benefited by this Policy in event of your death? (If not a near relative, state what interest the proposed beneficiary has in your life.) My Estate.

It is desired that the Policy be written with respect to the Beneficiary as nearly in accordance with the above request as the experience of the Company will suggest as being most likely to meet the requirements, and the acceptance of the Policy so written will be regarded as an acknowledgment that the Company has complied with the wishes of the applicant.

8. Have you personally employed or consulted any Physician during the last five years? If so, give names and residences of all. I have not.

9. Has any proposal or application ever been made or submitted to any Company, Association, Agent or Physician, for which insurance on your life is now pending or has not been granted for the full amount, and of the same kind as applied for? If so, state particulars, and the names of all such Companies, Associations, Agents or Physicians. No.

10 a. What amount of insurance is now in force on your life, and in what Companies or Associations? \$10,000 State Mutual Life Rome Ga.

b. Approximate dates of last insurance granted by each. Jan. 28, 1907, State Mutual Life Rome, Ga.

11. Has any Physician, Company, Association or Agent ever expressed an unfavorable opinion on your life with reference to life insurance or refused to reinstate insurance that had lapsed? If so, state particulars. No.

(Use this space for further explanation to the above question if necessary.)

Dated Dec. 17, 1910. Witness: H. B. Alexander. Applicant sign here, Wiley J. Dunken.



(The answers to the following questions must be filled in by the Examining Physician who must also witness the signature of the applicant below. If further explanation to any of the following answers are necessary, be particular to use the blank lines at the foot of this page, noting the number of the question to which the explanation applies.) Use good black ink only.

12. Family Record:

	Living		Dead		Date of death?
	Age?	Health?	Age?	Cause of death?	
Father .....	..	....	44	G. S. W. in Civil War	1884
Father's Father..	..	....	Aged	Senility	....
Father's Mother..	..	....	Aged	Senility	....
Mother .....	..	....	39	Texas Fever	1882
Mother's Father..	..	....	Aged	Senility	....
Mother's Mother..	..	....	Aged	Senility	....
5 Brothers.....	29	Good			
	34	Good			
	36	Good	27	Pneumonia-Acute	1893
	38	Good			
	38	Good			
Sisters .....	45	Good	18	Texas Fever	...

13. Have you ever had any of the following diseases? (Answer Yes or No, opposite each. If Yes, state the date, duration and severity of illness with full particulars.) Abscess, no; Apoplexy, no; Appendicitis, no; Asthma, no; Bronchitis (Chronic), no; Consumption, no; Disease of the Heart, no; Disease of Liver, no; Dropsy, no; Enlargement of Glands, no; Enlargement of Veins, no; Fits, no; Fistula, no; Gall Stone, no; Gout, no; Gravel, no; Habitual Headache, no; Hip Joint Disease, no; Jaundice, no; Neuralgia, no; Paralysis, no; Rheumatism, no; St. Vitus's Dance, no; Spitting of Blood, no; Syphilis, no; Tumors, no; Ulcers, no; Venereal Disease, no; Vertigo, no.

14. Have you had Inflammatory Rheumatism? If so, state severity and date of each attack. No.

15. Are you subject to Dyspepsia, Dysentery, or Diarrhoea? No.

16. Have you had during the last seven years, any disease or severe sickness? If so, state the particulars of each case, and the name of the attending physician. No.

17. Have you either gained or lost weight during the last five years? If so, state particulars. Neither.

18. Have you ever changed your residence on account of your health? If so, state particulars. No.

19. Have you during the last five years lived in the same house with any one suffering from consumption? If so, state particulars. No.

20. Which parent do you resemble in height, weight and general characteristics. Father.

21. Have you ever been intemperate in the use of either malt or spirituous liquors, or used any drug habitually? No.

22. Do you use either malt or spirituous liquors daily or nearly every day? If so, what is used and the approximate amount? No.

23. Have you ever taken any cure or treatment for any habit? If so, what, and when? No.

(Additional Questions to be answered when the Applicant is a Woman.)

24 a. Are you married? \_\_\_\_.

b. How long married? \_\_\_\_.

c. Number of labors? \_\_\_\_.

d. Date of last labor?

25 a. Were labors normal? \_\_\_\_.

b. Have you miscarried and if so from what cause and at what dates? \_\_\_\_.

c. Are you now pregnant? \_\_\_\_.

26 a. Is your menstruation regular and normal? \_\_\_\_.

b. Is there any organic disease of uterus or appendages, or is any suspected?

c. Are there any tumors in the breasts or any other part of the body? \_\_\_\_.

27. If a widow, state date and cause of husband's death? \_\_\_\_.

Dated at Nashville, Tenn., this 17 day of Dec. 1910.

In presence of J. W. Handly (Examining Physician).

Applicant must sign here (Write the Christian name in full.) Wiley J. Dunken.

Medical Certificate on the reverse of this page.

[fol. 52i] [Endorsed:] No. 98322. Aetna Life Insurance Company of Hartford, Conn. On the Life of Wiley J. Dunken. Sum Insured, \$10,000. Annual Premium, \$105.40. Age, 32. Date, January 28, 1911. Examined by J. R. E. 7 Year Convertible Terms, Non-Participating. 612.

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[fol. 53]      **AGREEMENT AS TO OFFERS IN EVIDENCE**

It is agreed, by and between attorneys for both sides, that copies of letters and other documentary evidence may be offered in evidence in this case, without the necessity of proving their execution, and that either a copy or the original of any such documentary evidence may be introduced without proof of their execution;

It is further agreed, for the purpose of the record, that either side may read excerpts from the statements of facts made of the former trials of this case, without the necessity of further proving them up; and

It is further agreed, that proof of death of the deceased was waived by the defendant insurance company, and that the necessary statutory demand, in order to entitle the plaintiff to the 12% damages and to reasonable attorney's fees, was made by the plaintiff, provided, under other facts in this case, the plaintiff is entitled to recover such penalties.

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**EVIDENCE: EXHIBIT No. 3**

Introduction, by plaintiff of Exhibit No. 3, same being a note for \$384.20, dated December 27th (?), 1910, payable to H. B. Alexander, signed W. J. Dunken, as follows:

\$384.20.

Dec. 27 (?) 1910.

Feb'y. 15th, after date I promise to pay to the order of H. B. Alexander, Mgr. Three Hundred Eighty-four and 20/100 Dollars, at Nashville, Tenn. Value received. No. —. Due —, —, —.  
(Signed) W. J. Dunken.

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**EVIDENCE: EXHIBIT No. 4**

Introduction, by plaintiff, of Exhibit No. 4, being a note signed by W. J. Dunken, payable to Burbank & Alexander, dated 3-25-1912, for the principal sum of \$202.04, as follows:

Form No. 71½.

Edition Nov. 1907. Interest is added to the face of the Note.

\$202

2 Int.

204.02 3-25. 1912.

On or before May 27th after date, without grace, for value received, I promise to pay to the order of Burbank & Alexander Agent of the Aetna Life Insurance Company, of Hartford, Conn., Two Hundred Four & 02/100 Dollars at his office in Nashville Tenn., the same, together with cash named below, being the premium and interest (less dividend, if any), under Contract No. 98321-22 in said Company.

It is understood and agreed that this note, with the partial cash payment of \$183.20, shall not bind said Company to any renewal or extension of the insurance under said contract until the Company has approved the same by delivering to the insured form No. 72½, containing a copy of this note, bearing the signature of an officer of the Company and countersigned by the agent; and it is also agreed that after such approval if this note is not paid when due said contract shall then cease and determine except for the nonforfeiting provisions (if any) to which it was entitled when the premium for which this note was given fell due.

(Signed) W. J. Dunken.

Written across the face in ind: "Paid."

## EVIDENCE: EXHIBIT No. 5

Introduction by plaintiff, of Exhibit No. 5, being a letter from H. B. Alexander to W. J. Dunken, dated Nashville Tenn., May 13, 1912, as follows:

Aetna Life Insurance Company of Hartford, Conn.

Agency at Nashville, Tenn.

Morgan G. Bulkeley, President

DEAR MR. DUNKEN:

May 13, 1912.

Your check for \$208.00 received. I here send you your premium receipts, also check for \$4.45 diff. due you. I appreciate your promptness in remitting. We are having very good business this year, and I hope it will be better with you as the season progresses. With personal regards and best wishes,

Yours sincerely, (Signed) H. B. Alexander.

[fol. 55] The above letter being written in ink.

## EVIDENCE: EXHIBIT No. 6

Introduction, by plaintiff, of Exhibit No. 6, being Premium receipt from the Aetna Life Insurance Co., to W. J. Dunken on Contract No. s-98322, as follows:

Morgan G. Bulkeley, Prest.

Hartford, Conn., January 28, 1912.

The Aetna Life Insurance Company hereby acknowledges the receipt of the payment due on the above date under Contract No. s-98322 on the life of W. J. Dunken in accordance with this statement.

Not binding without date of payment and signature of Agent here.

Paid this 13 day of May 1912.

(Rubber Stamp:) Burbank & Alexander, Mgrs., Agent at (Rubber Stamp:) Nashville, Tenn. (Ink:) D. Nash. See notice to contract holder on the back of this receipt.

## Statement

Payment due.....	\$105.40
	68.70
	36.70
	.37
	<hr/>
	37.07
	.37

(Signed) C. E. Elbert, Secretary.

On the back is the following:

*Notice to the Contract Holder*

The Insurance Contracts of this Company cease subject to their nonforfeiting value, if any, if the payments required thereon are not made on or before the day stipulated therein for such payment, except that a grace of thirty-one days is allowed for any payment after the first, subject to Interest for the days of grace taken.

All receipts given for renewal premiums bear the original or lithographed signature of the Secretary or Assistant Secretary of the Company, and the only evidence to the insured of the authority of an agent to receive a premium payment is the possession of such a receipt, which must also be countersigned by the agent when the payment is made.

[fol. 56] All contracts and agreements made by this Company are signed by one or more of its executive officers. No agent, general agent, or other person, except the officers above described, can grant or extend insurance, or alter or waive any of the conditions of its contracts, or make any agreement which shall be binding upon the company.



## EVIDENCE: EXHIBIT No. 7

Introduction, by plaintiff, of Exhibit No. 7, being premium receipt from the Aetna Life Insurance Co., to W. J. Dunken, on contract S-98321, as follows:

Morgan G. Bulkely, Prest.

Hartford, Conn., January 28, 1912.

The Aetna Life Insurance Company hereby acknowledges the receipt of the payment due on above date under Contract No. s-98321 on the life of W. J. Dunken, 103 So. 8th St. Waco, Texas, in accordance with this statement.

Not binding without date of payment and signature of Agent here:  
Paid this 13 day of May, 1912. (Rubber Stamp:) Burbank & Alexander, Mgrs., Agent at (Rubber Stamp:) Nashville, Tenn. (Ink:) D. See notice to contract holder on back of this receipt. Nash.

(Signed) C. E. Elbert, Secretary.

*Statement*

Payment Due .....	\$277.80
	105.40
	<hr/>
(On the back of said instrument:)	383.20

*Notice to the Contract Holder*

The Insurance Contracts of this company cease subject to their Non-Forfeiting value, if any, if the payments required thereon are not made on or before the day stipulated therein for such payment, except that a grace of thirty-one days is allowed for any payment after the first, subject to interest for the days of grace taken.

All receipts given for renewal premiums bear the original or lithographed signature of the Secretary or Assistant Secretary of the Company, and the only evidence to the insured of the authority of an [fol. 57] agent to receive a premium payment is the possession of such a receipt, which must also be countersigned by the agent when the payment is made.

All contracts and agreements made by this company are signed by one or more of its executive officers. No agent, general agent, or other person, except the officers above described, can grant or extend insurance, or alter or waive any of the conditions of its contracts, or make any agreement which shall be binding upon the Company.

*Admission*

It is admitted by defendant that for a few years Burbank & Alexander were a firm, doing business under the firm name of Burbank & Alexander and then Mr. Burbank dropped out of said firm, and it is admitted that at the time this insurance was originally applied for a- issued that the company's agency at Nashville, Tennessee, was the firm of Burbank & Alexander, this name appearing in the pleadings, and that at the date appearing in the pleadings, Mr. Burbank withdrew from the firm, and Mr. Alexander remained the agent for the Aetna Life Insurance Company in Nashville, Tennessee.

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EVIDENCE: EXHIBIT No. 8

Introduction by plaintiff, of Exhibit No. 8, being a letter from the Aetna Life Insurance Company, to W. J. Dunken dated at Nashville, Tenn., 2/22/13, as follows:

Aetna Life Insurance Company of Hartford, Conn.

A. Morgan G. Bulkeley, President; H. B. Alexander, State Manager;  
J. B. Dickson, Cashier

834 Stahlman Building

Nashville, Tenn., 2/22/13.

Mr. W. J. Dunken,  
Waco, Texas.

DEAR MR. DUNKEN:

Not knowing just exactly what you might want to do in regard to your premiums which became due January 28th, I am sending you an extension note, form #71, extending the full amount one more [fol. 58] month. Also I am sending you a blank form that you can fill in, and sign, and send your check for the difference, provided that you want to make a partial payment. You can make this form #71-1/2 for 60 days if you desire to make a reasonable partial payment.

Of course, if you prefer to pay the entire premium just now, it will be satisfactory, I will leave the matter entirely to you. I am glad to extend unto you any accommodation that you may need from time to time.

With very best wishes,

Yours very truly, (Signed) H. B. Alexander, Manager.  
Dictated by H. B. A. C. Enclosed.

## EVIDENCE: EXHIBIT No. 9

Introduction, by plaintiff, of Exhibit No. 9, being a letter from the Aetna Life Insurance Company, to W. J. Dunken, dated at Nashville, Tenn., 2/24/13, as follows:

Aetna Life Insurance Company of Hartford, Conn.

Morgan G. Bulkely, President; H. B. Alexander, State Manager;  
J. B. Dickson, Cashier

834 Strahlman Building

Nashville, Tenn., 2/24/13.

Mr. W. J. Dunken,  
115-1/2 So. 5th Street.  
Waco, Tex.

DEAR SIR:

I have your favor enclosing check for \$100 in part payment of your January 28th premiums.

I will credit the check on the amount of the premiums, but please sign and return to me at once the blank note which I sent you with my letter of the 22nd, or the one enclosed, and I will fill in the note for the proper amount,

With best wishes, I remain,

Very truly yours, (Signed) H. B. Alexander. D/C. Encl.-1.

[fol. 59]

## EVIDENCE: EXHIBIT No. 10

Introduction, by plaintiff, of Exhibit No. 10, being a letter from the Aetna Life Insurance Co. to W. J. Dunken, dated Nashville, Tenn., as follows:

Aetna Life Insurance Company of Hartford, Conn.

Morgan G. Bulkeley, President; H. B. Alexander, State Manager;  
J. B. Dickson, Cashier

834 Strahlman Building

Nashville, Tenn., 2/28/13.

Mr. W. J. Dunken,  
115-1/2 So. 5th Street,  
Waco, Texas.

DEAR MR. DUNKEN:

Your letter received the other day, containing your \$100 check, and also the note properly signed received this morning.

I am enclosing you a copy of your note as it now stands, showing the amount that you are due. I have made the note for 60 days; but you can pay it any time that you desire, and interest will be charged for only the time that the note has run.

I appreciate the way you take care of your premiums, and I beg to assure you that any extension that I make to you is always a pleasure.

With very best wishes,

Yours very truly, (Signed) H. B. Alexander, Manager.

Dictated by H. B. A/C. Encl. 1.

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EVIDENCE: EXHIBIT No. 11

Introduction, by plaintiff, of Exhibit No. 11, being letter from the Aetna Life Insurance Company to W. J. Dunken, dated at Nashville, Tenn., 3/31/14, as follows:

Aetna Life Insurance Company of Hartford, Conn.

Morgan G. Burkeley, President; H. B. Alexander, State Manager;  
J. B. Dickson, Cashier

834 Strahlman Building

Mr. W. J. Dunken,  
113 So. 5th St.,  
Waco, Texas.

Nashville, Tenn., 3/31/14.

[fol. 60] DEAR SIR:

I beg to acknowledge your favor enclosing check for \$200 to apply on your two premium notes.

I have credited the same on the notes and filled out the new notes to mature May 28th, for \$87.52 and \$50.50 respectively. I return you herewith your two notes which matured March 28th.

Yours very truly, (Signed) H. B. Alexander, Mgr. D/c.  
Encl.-2.

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EVIDENCE: EXHIBIT No. 12

Introduction, by plaintiff, of Exhibit No. 12, being a note for the face value of \$86.30, signed by Wiley J. Dunken, payable to H. B. Alexander as follows:

Form No. 71.

Edition Dec., 1907.

Interest is added to the face of the Note.

\$85.40

90

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\$86.30

2/12, 1914.

On or before Mch. 28, after date, without grace, for value received, I promise to pay to the order of H. B. Alexander, Agent of the Aetna Life Insurance Company, of Hartford, Conn., Eighty six and 30/100 Dollars, at his office in Nashville, Tenn.

This note, with a cash payment of \$20.00, being given to extend time for settlement of the Renewal Premium due 1/28, 1914, on Contract No. 98322, in said Company, it is understood and agreed that if the note is not paid when due said contract shall then cease and determine, except for the non-forfeiting provisions (if any) to which this contract was entitled when the premium for which this Note was given fell due; and it is also understood and agreed that this note will not be accepted by said Company if written to mature at a date later than 60 from the day when said premium fell due.

(Signed) Wiley J. Dunken.

The case, Lockwood &amp; Brainard Co.

[fol. 61]

## EVIDENCE: EXHIBIT No. 13

Introduction, by Plaintiff, of Exhibit No. 13, being a note payable to H. B. Alexander, dated 2/12/14, signed by Wiley J. Dunken, for the face value of \$250.35, as follows:

Form No. 71.

Edition Dec. 1907.

Interest is added to the face of the Note.

\$247.80

2.55

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250.35

2/12, 1914.

On or before Mch. 28 after date, without grace, for value received, I promise to pay to the order of H. B. Alexander, agent of the Aetna Life Insurance Company, of Hartford, Conn., Two Hundred and fifty & 35/100 Dollars at his office in Nashville, Tenn.

This Note, with cash payment of \$30.00, being given to extend time for settlement of the Renewal Premium due 1/28/1914, on Contract No. 98321 in said Company, it is understood and agreed that if the Note is not paid when due said contract shall then cease and determine, except for the non-forfeiting provisions (if any) to which this contract was entitled when the premium for which this note is given fell due; and it is also understood and agreed that this note will not be accepted by said Company if written to mature at a date later than 60 days from the day when said premium fell due.

(Signed) Wiley J. Dunken.

The Case, Lockwood &amp; Brainard Co.

(Enclosed in ink:) Paid, \$30.00 H. B. A.



## EVIDENCE: EXHIBIT No. 14

Introduction, by plaintiff, of Exhibit No. 14, same being notice of premium note due, addressed to W. J. Dunken, and signed by H. B. Alexander, Mgr., dated Nashville, Tenn., 3/27/15, as follows:

Aetna Life Insurance Company of Hartford, Conn.

Morgan G. Bulkeley, President; H. B. Alexander, State Manager;  
J. B. Dickson, Cashier

834 Stahlman Building

Mr. W. J. Dunken,  
115 So. 5th St.,  
Waco, Tex.

Nashville, Tenn., 3/27/15.

[fol. 62] DEAR SIR:

Your note for \$336.53 given for premium under policy No. 9832-22 will become due Mch. 30 without grace.

Please let me have remittance by that date to pay it; or if it is not convenient for you to pay the note in full, the Company may be willing to extend time for payment of part of the premium to May 30th provided you will forward a partial payment of \$50.00. If you desire the extension, please sign the enclosed and return with remittance for the above named amount, and I will forward your note to the Company for approval.

This should have your immediate attention.

Yours very truly, H. B. Alexander, Manager.

## EVIDENCE: EXHIBIT No. 15

Introduction, by plaintiff, of Exhibit No. 15, being notice of premium note due dated — — —, addressed to W. J. Dunken from H. B. Alexander, Manager, Nashville, Tenn., as follows:

Aetna Life Insurance Company, Hartford, Conn.

Morgan G. Bulkeley, President; H. B. Alexander, State Manager;  
J. B. Dickson, Cashier

834 Stahlman Building

Mr. W. J. Dunken,  
115 So. 5th St.,  
Waco, Texas.

Nashville, Tenn.

DEAR SIR:

Your note for \$289.40 given for premium under policies Nos. 98321-2 will become due May 30, 1915, without grace.

Please let me have remittance by that date to pay it; or if it is not convenient for you to pay the note in full, the Company may be willing to extend time for payment of part of the premium to July 21, 1915, provided you will forward a partial payment of \$—. If you desire the extension — for the above named amount, and I will forward your note to the Company for approval.

This should have your immediate attention.

Yours very truly, H. B. Alexander, Manager.

[fol. 63]

EVIDENCE: EXHIBIT No. 16

Introduction, by plaintiff, of Exhibit No. 16, being a letter from Aetna Life Insurance Company to W. J. Dunken, dated Nashville, Tenn., 6/8/15, as follows:

Aetna Life Insurance Company of Hartford, Conn.

Morgan G. Bulkeley, President; H. B. Alexander, State Manager;  
J. B. Dickson, Cashier

834 Stahlman Building

Mr. W. J. Dunken,  
115 So. 5th St.,  
Waco, Texas.

Nashville, Tenn., 6/8/15.

DEAR SIR:

Your premium note fell due May 30th, amount \$289.40. Under date of May 24th I wrote you enclosing a new note calling for a partial payment of \$50 with two months' extension of the balance.

I have failed to hear from you and have protected the note for you in order to prevent your policy from lapsing.

I am herewith enclosing you another note and beg that you will sign and return the same to me by first mail along with remittance for the \$50 additional payment. If it is impossible, however, for you to make the payment just now, then please sign the blank note and return to me anyhow and you can send me the \$50 a little later.

Please give this matter your immediate attention and let me hear from you at once.

Yours very truly, (Signed) H. B. Alexander, Mgr. D/C. E.

EVIDENCE: EXHIBIT No. 17

Introduction, by plaintiff, of Exhibit No. 17, being a letter of date 6/12/15, from the Aetna Life Insurance Company to W. J. Dunken, as follows:

Aetna Life Insurance Company of Hartford, Conn.

Morgan G. Bulkeley, President; H. B. Alexander, State Manager;  
J. B. Dickson, Cashier

834 Stahlman Building

Mr. W. J. Dunken,  
[fol. 64] c/o Dunken Realty Co.,  
Waco, Texas.

Nashville, Tenn., 6/12/15.

DEAR MR. DUNKEN:

I have your kind letter of the 9th containing note and check for \$50.

As your premium became due several days ago it was necessary that attention be given it at once so I took the privilege of signing an extension note for you and am taking care of the matter personally; otherwise your policy would have lapsed.

I beg to assure you that it was a pleasure to do anything I could in this matter.

I am writing the Company today for a sufficient loan to pay up the balance of your premiums for the year, and next year perhaps you will not only be in a position to pay your premium promptly but also pay off the loan and keep your policies in good shape.

I hope you will have a fine crop year and that your business will be prosperous in every way, for I feel you so justly deserve all the good things that could come to anyone. With kindest regards,

Your friend, (Signed) H. B. Alexander, Manager. H. B. A./C.

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EVIDENCE: EXHIBIT No. 18

Introduction, by plaintiff, of Exhibit No. 18, being a letter of date 2/16/16 from the Aetna Insurance Company to W. J. Dunken, dated at Nashville, Tenn., as follows:

Aetna Life Insurance Company of Hartford, Conn.

Morgan G. Bulkeley, President; H. B. Alexander, State Manager;  
J. B. Dickson, Cashier

834 Stahlman Building

Mr. W. J. Dunken,  
115 So. 5th Street,  
Waco, Texas.

Nashville, Tenn., 2/16/16.

DEAR MR. DUNKEN:

I wrote you on the 29th of January in regard to conversion of your [fol. 65] Term policy.

I am enclosing herewith a conversion form for you to sign and return to me, and write me a letter as to how to fill it in.

Perhaps it would be just as good plan for you to convert as of the present date, and if you wish to do this you should sign the blank extension note that I am also enclosing and return to me, which will give you two months from January 28th before you have to pay anything on the new premium and then I can allow you to make only small partial payments along as usual.

I appreciate your business and your friendship in the past more than I can ever express to you, and I hope you will continue this policy with me. Of course you have two more years at the same rate on this policy before it expires, but unless you convert it now you will have to stand another medical examination; as it is, no medical examination is required; your policy is incontestible and just as good as gold in every respect.

Hoping to hear from you by return mail, and with kind personal regards,

Yours sincerely, (Signed) H. B. Alexander, Manager. H.  
B. A./C. Encls.

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#### EVIDENCE: EXHIBIT No. 19

Introduction, by plaintiff, of the following copy of letter dated Waco, Texas, 2/19/16, to H. B. Alexander from W. J. Dunken, same being copied from the statement of facts of a former trial of this case, said statement of facts having been filed of record in the office of the Clerk of the District Court, McLennan County, Texas, on June 19, 1919. This letter is shown on page 60 of said statement of facts, as exhibit number 19, and is as follows:

Waco, Texas, 2-19-16.

Mr. H. B. Alexander,  
Nashville, Tenn.

DEAR SIR:

I am enclosing you the note properly signed also the application for conversion of my Term policy which I want you to attend to as promptly as possible and write me your acceptance of both by return [fol. 66] mail, as I will be away from home after about ten days for several weeks and want this matter all fixed up before I go. Thanking you for your immediate acceptance, I am as ever,

Wiley J. Dunken, 302 T-H Bldg., Waco.

Over

P. S.—Where I haven't filled in on the enclosed application you finish it so both my policies will be the same.

Respt., W. J. D.

## EVIDENCE: EXHIBIT No. 20

Introduction, by plaintiff, of Exhibit No. 20, being Application for conversion of Term policy into Commercial Twenty pay Life policy, which is attached to Exhibit No. 27, which is policy No. 152775. This application is as follows:

S-152,775.

Form No. 673, Ed. Jan., '11.

*Application for Conversion of Term Policies*

2-19, 1916.

I, Wiley J. Dunken, of Waco, County of McLennan, State of Texas, hereby apply to the Aetna Life Insurance Company for changed insurance on my life, in accordance with the conditions of Term Policy No. 98322 issued by said company, and I hereby certify that said policy has not been assigned, and agree that the statements and answers in the application for said term policy shall be the basis of the new contract or policy herein applied for and form a part of the same, except that the kind of policy, amount of the same, and the premium thereon, shall be as specified below. I further certify that I have not suffered impairment of the use of an eye, an arm, hand, leg or foot, or impairment of physical ability from any cause, and upon the basis of the correctness of this statement I request that the new policy contain the usual provisions for disability.

Death beneficiary to be the same as now written in Term Policy. [fol. 67] What kind of a policy is desired? 20 Payment Life Commercial to be dated Jan. 28, 1911. What amount of insurance is desired? \$10,000. Shall the premiums be payable during the whole term of the policy? No. If not, during how many years shall the premiums be payable? 20 years.

If a participating policy, the dividends, unless otherwise requested, shall reduce premiums or be paid in cash.

Premiums: \$277.70 Annually.

" Semi-annually.

" Quarterly.

In presence of Layton H. Little.

(Signed) Wiley J. Dunken.



## EVIDENCE: EXHIBIT No. 21

Introduction, by plaintiff, of Exhibit No. 21, being Extension Note dated February 29, 1916, signed by W. J. Dunken, in the sum of \$106.45, as follows:

Form No. 71.

Edition Jan, 1916.

(Printed in Red:) Important.—This note must be signed on or before the days of grace expire.

Interest is added to the face of the Note.

105.40

1.05

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\$106.45

Feby. 26, 1916.

On or before Mch. 29 after date, without grace, for value received, I promise to pay to the order of (Rubber stamp) H. B. Alexander Agent of the Aetna Life Insurance Company of Hartford, Conn., One Hundred and Six & 45/100 Dollars at his office in (Rubber stamp:) Nashville, Tenn., for premium due 1/28 under contract No. 98322.

This note, with cash payment of \$—, being given to extend time for settlement of said Renewal Premium, it is understood and agreed that if the Note is not paid when due said contract shall then cease and determine, except for the non-forfeiting provisions (if any) to which this contract was entitled when the premium for which this Note was given fell due; and it is also understood and agreed that [fol. 68] this Note will not be accepted by said Company if written to mature at a date later than 60 days from the day when said premium fell due.

(Sign here:) x(Signed) Wiley J. Dunken, Insured or Beneficiary. x Must be signed on both lines marked x.

Across the face is endorsed in ink the following:

"Returned to Forrester & Stanford, Attys. as per letter of today. H. B. Alexander, Mgr., June 12, 1916."

## EVIDENCE: Exhibit No. 22

Introduction, by plaintiff, of Exhibit No. 22, being a Postal Telegraph Company's telegram, from H. B. Alexander to W. J. Dunken, dated at Nashville, Tenn., 12.03 p. m. Feb. 21, 1916, as follows:

The Postal Telegraph Cable Company of Texas

This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message. S. M. English, President and General Manager.

11 D.S 49 day letter.

Nashville, Tenn., 12.03 p. m. Feb. 21, 1916.

Wiley J. Dunken,  
302 T. H. Bldg.,  
Waco:

Your letter received. With enclosures. Please mail me your terms policy at once and advise me by letter if you want the policy converted to date five years back and if so do you want the company to loan you sufficient amount to pay differences in the back premiums.

H. B. Alexander. 1.22 p. m.

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EVIDENCE: Exhibit No. 23

Introduction, by plaintiff, of Exhibit No. 23, being a copy of a letter written by Wiley J. Dunken to H. B. Alexander, dated 2-22-16, as follows:

The Dunken Realty Co.

Waco, Texas

T. E. Leach, Office Manager

[fol. 69]

New Phone, 2091; Old Phone, 891

2-22-16.

Mr. H. B. Alexander,  
Nashville, Tenn.

DEAR SIR:

Your several letters and telegram have all come to me and in answer will say that I want to convert my policy as stated before, but will have to borrow the money as you have suggested, but I want you to get me of- as light as you can for I have been so hard up as at this time and had to get my friend Mr. Freeman to help me out on my other policy, as you already know, but I hope before this year is out that I can get my affairs in such shape that I won't be pressed, as you know I have been loaded on real estate for the last three years and when the war came I was caught in the crash, but I am hoping to see some change in the near future.

I am placing myself in your hands in this matter and feel that you will take the proper care of me.

Thanking you for your many past favors, and this one too, I am,  
Sincerely yours, (Signed) Wiley J. Dunken. (Copy.)

## EVIDENCE: Exhibit No. 24

Introduction, by plaintiff, of Exhibit No. 24, being a letter from the Aetna Life Insurance Company to W. J. Dunken of 2/24/16, dated at Nashville, Tenn., as follows:

Aetna Life Insurance Company of Hartford, Conn.

Morgan G. Bulkeley, President; H. B. Alexander, State Manager;  
J. B. Dickson, Cashier

834 Stahlman Building

Nashville, Tenn., 2/24/16.

Mr. W. J. Dunken,  
115 So. 5th St.,  
Waco, Texas.

DEAR SIR:

I have your letter in regard to the conversion of your policy. I will ask the company to make the conversion to the same kind and date as your other policy, and with the new policy send papers for the loan value, the proceeds to be used on the cost of conversion. [fol. 70] In order to protect your Term policy in the meantime, in case any delay should occur, please sign both forms of the enclosed extension note and return same to me. This will give us to March 30th, to complete the conversion and when the loan is made and the premium paid this note will be cancelled and returned to you. In case I may not get the papers to you before you leave Waco, please let me know where to address you.

Yours very truly, (Signed) H. B. Alexander, Mgr. D/C. E.

*Admission*

It is admitted by defendant that the old policy has stamped on it the following "Surrendered; new number, 152,755; \$10,000.00," and same was made by an executive officer at the Home office at the time the new policy was issued." and it is further admitted that Mr. J. L. English who signed the letter next offered in evidence, was the Vice President of the defendant corporation.

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EVIDENCE: EXHIBIT No. 25

Introduction, by plaintiff, of Exhibit No. 25, being a letter of date February 28, 1916, dated at Hartford, Conn., from Mr. J. L. English to Mr. H. B. Alexander, as follows:

(Copied from Statement of Facts on former trial of this case.)

## EXHIBIT 25

Form No. 175-A.

Hartford, Conn., Feby. 28, 1916.

Concerning No. 152,775—Dunken

Mr. H. B. Alexander, Manager.

DEAR SIR:

Enclosed find this policy in exchange for No. 98322 surrendered. We also enclose 1916 renewal and blanket receipt covering premiums to 1916, also loan forms Nos. 378 and 547. Not later than your account of 31st *mpoz.*, you should report on the new number; Increase 1911 premium (on first premium sheet) \$172.30, charging first commission \$79.46. Increase four renewals premiums (on renewal sheet) \$689.20, charging renewal commissions 5%. Interest [fol. 71] to 28th inst. \$159.38—and report 1916 premium regularly in same account with interest of \$1.39.

If the loan is to be mare, return the policy to the company with the loan forms properly executed, notifying us that you have collected \$312.97, this amount being determined as follows:

Conversion cost as above.....	\$1,020.88
1916 premium and interest.....	279.09
	<hr/>
	1,299.97
Deduct net loan.....	987.00
	<hr/>
	312.97

Yours truly, (Signed) J. L. English, V. P.

EVIDENCE: EXHIBIT No. 26

Introduction, by plaintiff, of Exhibit No. 26, being a letter from the Aetna Life Insurance Company to W. J. Dunken, dated at Nashville, Tenn., 3/4/16, as follows:

Aetna Life Insurance Company of Hartford, Conn.

Morgan G. Bulkley, President; H. B. Alexander, State Manager;  
J. B. Dickson, Cashier

834 Stahlman Building

Mr. W. J. Dunken,  
115 So. 5th St.,  
Waco, Texas.

Nashville, Tenn., 3/4/16.

DEAR MR. DUNKEN:

I take pleasure in handing you herewith your \$10,000 Commercial 20 pay L. policy converted from Seven Year Term.

I also enclose a loan note which must be signed by you, with two witnesses to your signature, whose addresses should be given. Also please sign the form 378, which authorizes the Company to deduct the 1916 premium from the proceeds of the loan.

The amount due now to complete the transaction is \$312.97, which is determined as follows:

Conversion Cost .....	\$1,020.88
1916 premium and interest.....	279.09
	<hr/>
	1,299.09
Deduct net loan .....	987.00
	<hr/>
	\$312.97

Please do not fail to send me your policy when returning the above. Thanking you, I remain,  
Sincerely yours, (Signed) H. B. Alexander, Manager. v.  
Encls.

[fol. 72]

#### Admission

It is admitted that the record shows that the letter of March 4th, 1916, was the end of the correspondence between Dunken and the defendant company or its agents, and that Dunken received no further notice from the company, (Former statement of facts page 10).

#### EXHIBIT No. 27

Introduction, by plaintiff, of Exhibit No. 27, being the new policy, for which the Term policy was exchanged, same being Contract No. 152,775, for \$10,000.00, on the life of Wiley J. Dunken, as follows: (See next page.)

[fol. 72a-b]

#### EVIDENCE: EXHIBIT No. 27

Premiums payable during 20 years or until prior death.  
Insurance payable at death. Non-Participating.

No. 152,775. \$10,000. Age, 32 Years

The Aetna Life Insurance Company of Hartford, Connecticut, Hereby agrees to pay for the surrender of this policy at its Home Office the sum of Ten Thousand Dollars (herein called the sum insured upon receipt of due proof of the death of Wiley J. Dunken, of Waco, County of McLennan, State of Texas, (herein called the insured).

This policy is issued and accepted subject to all the conditions, benefits and privileges described on the subsequent pages hereof, and which are hereby made a part of this contract.



In witness whereof the said Aetna Life Insurance Company has by its President and Secretary or Assistant Secretary signed this contract in the City of Hartford and State of Connecticut this Twenty eighth day of January 1911.

M. G. Bulkley, President. — — —, Secretary.

, Non-Partc. Lim't'd Paym't L. Com'l Policy Dis. 717. May, 1912.

[fol. 72c] 1. Consideration. 2. Premiums When Payable

The foregoing Agreement is made in consideration of the application for this policy, which application is hereby made a part of this contract and a copy of which is attached hereto and in further consideration of the Annual premium of Two Hundred, seventy-seven and 70/100ths Dollars to be paid to the Company in advance at its Home Office or to its agent at or before five o'clock P. M. of the Twenty-eighth day of January in each and every year until Twenty full years' premiums have been paid or until the prior death of the insured.

3. Death Beneficiary. 4. Life Beneficiary

The said sum insured shall be payable to the death beneficiary as follows: the insured's executors, administrators or assigns, less any unpaid premium for the current policy year; the cash value or the loan value hereinafter described shall be payable to the insured, (herein called the life beneficiary), and all such payments shall be subject to the rights herein granted for varying the provisions of this policy and to any indebtedness to the Company on account of this policy, including all loans made by the Company as herein provided.

5. Change of Beneficiary

The beneficiary above designated may be changed at any time, provided the policy is not then assigned by the life beneficiary and is then returned to said Company with a request for such change duly signed by the life beneficiary alone, and such change shall take effect on endorsement of the same hereon by the Company.

[fol. 72d] 6. Premiums May be Paid Annually, Semi-Annually, or Quarterly

The Company will accept the premium payable for annual, semi-annual or quarterly periods, according to its published rate for such at the time this policy is issued, provided that before any change is made from the method of payment herein stipulated the policy shall be forwarded to the Home Office of the Company for proper endorsement.

## 7. Conditions Regarding Payment of Premiums

This policy shall not take effect until the first premium hereon shall have been actually paid during the good health of the insured, a receipt for which payment shall be the delivery of the policy. If any subsequent premium be not paid when due then this policy shall cease, subject to the values and privileges hereinafter described; except that a grace of thirty-one days, during which time the policy remains in full force, will be allowed for the payment of any premium after the first, provided that with the payment of such premium interest at the rate of six per cent per annum is also paid thereon for the days of grace taken; but for any reckoning herein named the time when a premium becomes due shall be the day herein stipulated therefor without grace.

No renewal premium shall be considered paid, unless a receipt shall be given therefor bearing the original or lithographed signature of the Secretary or Assistant Secretary of this Company and countersigned by the agent.

## 8. Incontestable

This policy and the application herefor constitute the entire contract between the parties hereto and it shall be incontestable from its date of issue except for non-payment of premium; but if the age of the insured has been misstated the amount payable hereunder shall be such an amount as the premium paid would have purchased at this Company's published rate now in use for the correct age.

## 9. Statements of Insured not Warranties

All statements made by the insured shall in the absence of fraud be deemed representations and not warranties and no such statement shall avoid the policy or be used in defence to a claim under it unless it is contained in the written application herefor and a copy of such application is endorsed upon or attached to this policy when issued.

## 11. Loans

After three full years' premiums have been paid hereon, before default in the payment of premium, and before the policy becomes a claim, the Company will loan upon the sole security of this policy at six per cent interest payable annually in advance the whole, or, at the option of the borrower, any part of the cash value shown by Table A at the end of the current policy year, less all indebtedness to the Company hereon and less also any unpaid portion of the premium and interest on the loan for the remainder of the current policy year. For the purpose of such loan the policy shall be returned to the Company together with a proper assignment of the same and said assignment may be executed by the life beneficiary alone provided the interest of such beneficiary is not then assigned.

## 12. Automatic Premium Loan

If a request for the automatic premium loan privilege has been signed by the life beneficiary and assignee, if any, and is received at the Company's Home Office together with this policy before default in the payment of premium, such privilege will be endorsed hereon by the Company, and thereafter until a written revocation of said request signed by the life beneficiary and assignee, if any, has been endorsed hereon by the Company, the amount of any premium not paid in cash when due or within the days of grace will, without further action by the owners, be loaned by the Company in payment of such premium and charged as an indebtedness secured by this policy, subject to interest at the rate of six per cent per annum as above described for loans, provided that the net loan value as above described is sufficient to pay the premium and interest then due.

## [fol. 72e] 13. When Insurance Will Terminate for Non-payment of Interest

Interest on any indebtedness hereon not paid when due shall be added to the principal and reckoned as a part thereof. Failure to pay any loan or interest due thereon will avoid this policy when the total indebtedness hereon to the Company shall equal or exceed the loan value at the time of such failure, but not before that time, nor until one month after notice of the same has been mailed by the Company to the last known address of the person to whom the loan was made and of the insured, and assignee, if any.

## 14. Non-forfeiting Values—Extended Insurance

After three full years' premiums have been paid hereon and any subsequent premium becomes due and is unpaid the entire reserve then existing under this policy, less not more than two and one-half per cent. of the sum insured and less also any indebtedness hereon to the Company, will, without action by the owner, be applied as a net single premium at the then age of the insured to extend as term insurance without the right to loans the sum insured by this policy, less any indebtedness to the Company secured hereby. The reserve and single premium named herein shall be computed according to the American Experience Table of Mortality and three and one-half per cent. interest; or

### Paid-up Policy

If requested by the life beneficiary and assignee, if any, and if this policy is surrendered to the Company within two months after the first unpaid premium becomes due the said net single premium will be applied to the purchase of a paid-up policy payable at the death of the insured; or

### Cash Value

Under the conditions applicable to the issue of the paid-up policy above described, or after all premiums required hereon have been paid, the Company will pay for the surrender hereof a cash value at least equal to the sum which would otherwise be applicable to the purchase of the extended term or paid-up insurance above provided.

The extended term insurance or the paid-up policy above provided will be entitled to a cash surrender value of the entire reserve existing thereon at the time of surrender according to said table of mortality and rate of interest, and the paid-up policy will be entitled to a loan equal to its cash value upon the conditions herein prescribed for a loan under this policy.

*Table A*

This table shows the non-forfeiting values above described at the end of completed policy years when there is no indebtedness to the company secured by this policy. Each full quarter of a year that has elapsed after the end of any policy year and for which quarter year the premium due has been paid will increase the cash value and the paid-up policy one-fourth of the increase for the full year. The term of the extended insurance will be reckoned from the time when the first unpaid premium becomes due, and will not vary with the amount of the insurance.

No deduction from these values will be made for a surrender charge.

At end of year	Extended term insurance		Paid-up policy	Cash or loan value
	Years	Days		
3.....	4	326	\$1,080	\$400
4.....	7	183	1,610	610
5.....	10	69	2,130	820
6.....	12	302	2,660	1,050
7.....	15	93	3,190	1,280
8.....	17	154	3,710	1,520
9.....	19	115	4,240	1,770
10.....	20	353	4,770	2,040
11.....	22	149	5,300	2,310
12.....	23	250	5,820	2,600
13.....	24	309	6,350	2,890
14.....	25	336	6,880	3,200
15.....	27	178	7,540	3,590
16.....	28	195	8,030	3,910
17.....	29	269	8,520	4,240
18.....	31	88	9,020	4,680
19.....	33	169	9,510	4,940
20.....	..	..	.....	5,310
25.....	..	..	.....	5,900
30.....	..	..	.....	6,520

Values provided for in the policy and not shown in this table will be computed upon the same basis as those given.

The entire loan value for the end of any policy year will be available during the same year if the premium for that year has been paid.

### Effect of Indebtedness on Non-forfeiting Values Shown by Table A

The cash value shown by Table A will be decreased by the amount of any indebtedness, and the paid-up policy will be decreased in the same proportion that such indebtedness bears to the cash value hereof.

### [fol. 72/] 15. Cash Value in Event of Permanent Total Disability

Twelve months after proof is received at the Home Office of the Company that from causes originating after the delivery of this policy, the insured has become wholly, continuously and permanently disabled and will for life be unable to perform any work or conduct any business for compensation or profit, then in lieu of all other values, benefits or privileges herein provided, without further payment of premium, all premiums previously due having been paid, the Company will pay in full settlement of this policy upon request duly executed by the life beneficiary and assignee, if any, one twentieth of the sum insured and will pay the same amount annually thereafter until twenty such payments in all have been made; or will pay the amount of annuity shown by the following table of annuities for the age of the insured at the last birthday preceding the receipt of such proof, and the same amount annually thereafter during a fixed period of nine years (making ten annuity payments certain) and for as many full years longer as the insured shall live, provided that at every such annuity payment after the tenth satisfactory proof is furnished that the insured is then living. Any indebtedness to the Company on account of this policy will reduce the amount of either of said annual payments in the same proportion that said indebtedness bears to three-fourths of the sum insured.

*Table of Annuities for Each One Thousand Dollars in the Sum Insured*

Age	Annuity	Age	Annuity	Age	Annuity	Age	Annuity	Age	Annuity	Age	Annuity	Age	Annuity
16 .....	\$34 26	36 36	\$41 46	47 48	\$47 56	57 58	\$57 66	67 72	\$70 76	77 78	\$81 82	82 83	\$81 82
17 .....	34 28	37 38	42 48	49 58	59 68	73 78	82 83	83 84	84 85	85 86	86 87	87 88	88 89
18 .....	34 29	37 39	42 49	50 59	61 69	74 79	83 84	84 85	85 86	86 87	87 88	88 89	89 90
19 .....	35 30	38 40	43 50	51 60	68 70	76 80	83 84	84 85	85 86	86 87	87 88	88 89	89 90
20 .....	35 31	38 41	43 51	52 61	64 71	77 81	83 84	84 85	85 86	86 87	87 88	88 89	89 90
21 .....	35 32	39 42	44 52	53 62	65 72	78 82	84 85	85 86	86 87	87 88	88 89	89 90	90 91
22 .....	35 33	39 43	44 53	54 63	66 73	79 83	84 85	85 86	86 87	87 88	88 89	89 90	90 91
23 .....	36 34	40 44	45 54	55 64	67 74	80 84	85 86	86 87	87 88	88 89	89 90	90 91	91 92
24 .....	36 35	40 45	46 55	56 65	69 75	81 85	86 87	87 88	88 89	89 90	90 91	91 92	92 93
25 .....	36 35	40 45	46 55	56 65	69 75	81 85	86 87	87 88	88 89	89 90	90 91	91 92	92 93



The Company will extend the privileges and benefits for permanent total disability above described to cover the irrecoverable loss of the entire sight of both eyes, or the total and permanent loss by removal or disease of the use of both hands or of both feet or of such loss of one hand and one foot all from causes originating after the delivery of this policy and before default in the payment of premium.

Any benefit for disability within the meaning of this policy is conditioned upon the Company being permitted to examine the insured when desired within one year after the receipt of the proof, and such benefit will not be included in the paid-up policy herein provided to be issued on default in payment of premium.

#### 16. Reinstatement

Within five years after default in any premium payment, if this policy has not been surrendered, it may be reinstated upon evidence of insurability satisfactory to the Company and by payment of arrears of premiums with interest at the rate of six per cent. per annum and by payment or reinstatement of whatever indebtedness to the Company existed hereon at the date of default with interest from that date.

#### 17. Modes of Paying the Insurance

If the policy is not assigned by the life beneficiary the life beneficiary may elect, or the payee after the death of the insured without such election may elect, by written notice filed at the Home office of the Company, before any payment on the sum insured has been made, to have the net sum payable by the Company under this policy either as a death claim or as a cash surrender value, paid by one of the following modes in lieu of payment in one sum, provided the one sum to which every such payee would otherwise be entitled amounts to Five Hundred Dollars or more. Any mode of payment involving life instalments shall apply only to personal payees, the right of any payee contingent upon the death of a previous payee after the death of the insured shall be only such of the instalments certain as remain unpaid at the death of the last previous payee, and any election shall take effect only upon an endorsement of the same hereon by the Company. The first instalment or annuity by either of these modes will be paid when the one sum becomes payable as hereinbefore provided, and the remaining instalments will be payable annually thereafter on the anniversary of the payment of the first instalment.

Under the third mode the attained age of any payee will be reckoned, under a death claim, as that of the last birthday of such payee preceding the death of the insured; or in case of a cash surrender value, as that of the last birthday preceding the time when the value first became payable by the Company, and satisfactory evidence of the date of birth of the payee, or payees, must be furnished before the instalment payments commence.

## [fols. 72g &amp; h] 18. Sum May Remain with Company at Interest

First. The payment annually in advance of three per cent. interest on the net sum payable, and the payment of the said sum at the death of the payee, less the unearned part of said interest, if any; and unless otherwise elected the payee may at the end of any interest year require the payment of the principal sum or any portion thereof.

## 19. Instalments for Limited Period

Second. The payment of equal annual instalments for a limited number of years. The amount of instalment for each one thousand dollars in the net sum payable is shown in Table B.

Tables B and C show the amount of each annual instalment for \$1,000 in the net sum payable. Instalments for a greater or less amount will be proportionate.

Table B

Number of annual instalments .....	5	10	15	20	25	30	40
Amount of each instalment ...	\$213.90	\$116.14	\$83.85	\$68.03	\$58.65	\$52.57	\$45.21

## Instalments During Life.

Third. The payment of equal annual instalments for a fixed period of twenty-five years and for as many full years longer as the payee shall live. The amount of instalment for each one thousand dollars in the net sum payable is shown in Table C opposite the attained age of the payee.

Table C

Age attained by payee	Amount of each instalment	Age attained by payee	Amount of each instalment
10 and Younger.....	\$42.55	40	\$51.22
11.....	42.70	41	51.67
12.....	42.86	42	52.11
13.....	43.03	43	52.57
14.....	43.21	44	53.02
15.....	43.39	45	53.46
16.....	43.58	46	53.90
17.....	43.78	47	54.34
18.....	43.99	48	54.76
19.....	44.20	49	55.17
20.....	44.43	50	55.57
21.....	44.66	51	55.94
22.....	44.91	52	56.29
23.....	45.16	53	56.62
24.....	45.43	54	56.93
25.....	45.70	55	57.21
26.....	45.99	56	57.46
27.....	46.29	57	57.69
28.....	46.60	58	57.89
29.....	46.92	59	58.06
30.....	47.26	60	58.20
31.....	47.60	61	58.32
32.....	47.96	62	58.41
33.....	48.33	63	58.49
34.....	48.72	64	58.54
35.....	49.11	65	58.58
36.....	49.51	66	58.60
37.....	49.93	67	58.61
38.....	50.35	68	58.62
39.....	50.78	and over	

## 22. How Payable After Death of Payee

Unless otherwise provided, any sum payable by the Company after the death of a payee under the first, second and third modes shall be payable to the executors, administrators or assigns of the payee.

## 23. Supplementary Contract

When this policy becomes a claim, if an election has been made requiring payment by annual instalments, the policy shall, if required by the Company, be surrendered and a supplementary contract issued for the mode of payment elected.

## 24. Commutation of Instalments

Unless otherwise elected the payee or payees under the second and third modes, may at any time surrender the contract for the commuted value of the instalment payments yet to be made, computed upon the same basis as the computations in the second mode, provided that no such commutation will be made under the third mode except after the death of the payee or payees occurring within the aforesaid twenty-five years.

## 25. Non-participating

This policy shall not be entitled to share in the surplus earnings of the Company.

## 26. Assignments

No assignment of this policy shall be binding upon the Company until the original or a duplicate thereof is filed at its Home Office. The Company does not assume any responsibility for the validity of an assignment.

## All Agreements Must be Signed by an Executive Officer

All agreements made by the Company are signed by its President, Vice-President, Secretary, Assistant Secretary, Treasurer or Assistant Treasurer. No other person can alter or waive any of the conditions of this policy or make any agreement which shall be binding upon the Company.

[fol. 72i] This copy of the application should be carefully examined and if any error or omission is found the policy should be returned immediately to the Home Office of the Company for correction.

s-152,775.

Form No. 673. Ed. Jan. '11.

## *Application for Conversion of Term Policies*

2-10-1916.

I, Wiley J. Dunken, of Waco, County of McLennan, State of Texas, hereby apply to the Aetna Life Insurance Company for changed insurance on my life, in accordance with the conditions of Term Policy No. 98322 issued by said Company, and I hereby certify that said policy has not been assigned, and agree that the statements and answers in the application for said Term Policy shall be the basis of the new contract or policy herein applied for and form a part of the same, except that the kind of policy, amount of the same, and the premium thereon, shall be as specified below. I further certify that I have not suffered impairment of the use of an eye, an arm,

hand, leg or foot, or impairment of physical ability from any cause, and upon the basis of the correctness of this statement I request that the new policy contain the usual provision for disability.

Death Beneficiary to be the same as now written in Term Policy.

What kind of a policy is desired? 20 Payment Life Commercial, to be dated Jan. 28, 1911.

What amount of insurance is desired? \$10,000.

Shall the premiums be payable during the whole term of the policy? No.

If not, during how many years shall the premiums be payable? 20 years.

If a participating policy, the dividends, unless otherwise requested, shall reduce premiums or be paid in cash? —.

Premium, \$277.70, Annually; \$—, Semi-Annually; \$—, Quarterly.

In presence of Layton H. Little.

Signed Wiley J. Dunken.

[fol. 72j]

Form No. 1, Application

Ed. April, 1910

Executive Officers: President, Vice-President, Secretary, Asst. Secretary, Treasurer

Page 1

I hereby apply to the Aetna Life Insurance Company for a contract of insurance upon my life, and I do hereby, declare that I am in sound health and have no disease or ailment not fully set forth herein; that the statements and answers herein made and signed by me are complete and true, and I agree that they shall form a part of the contract or policy issued by said Company upon my life. I further agree that no statement or declaration made to any agent, examiner, or any other person, and not contained in this application, shall be taken or considered as having been made to, or brought to the notice or knowledge of, said Company, or as charging it with any liability by reason thereof. I also acknowledge that all policies and agreements made by said Aetna Life Insurance Company are signed by one or more of its executive officers, and that no agent or other person not an executive officer can grant insurance or waive any condition of its policies or make any agreement which shall be binding upon said Company. Use good Black ink only.

1a. What is your name? (Write Plainly Christian name in full.)  
Wiley Jamerson Dunken.

b. What is your present occupation or employment? If more than one state all. (If a clerk, salesman, merchant, manufacturer, mechanic or laborer, state class of goods sold, manufactured or handled.) Commercial Salesman.



2. Do you contemplate changing your occupation, or traveling or residing south of the 32d degree, or north of the 60th degree of north latitude? If so, state particulars. No.

3a. In what employments have you heretofore been engaged? Same for several years.

b. Have you been, or are you now, employed in the Army or Navy? No.

c. Are you, or have you ever been connected with the manufacture or sale of malt or spirituous liquors? If so, when, and how? No.

4a. What is the Place and date of your Birth? Sherman, Texas; Year, 1878; Month, Sept.; Day, 6.

b. What is your age next Birthday? 33 Years.

c. Are you married? Yes.

5a. Where do you reside? (Street and Number.) 3104 Dudley Ave. (City or Town.) Nashville. (County.) Davidson. (State.) Tenn.

b. What is your business address? 8 Noel Block. Nashville. Davidson. Tenn.

6a. What kind of a Policy is desired? \$10,000 Twenty Payment Life Commercial Policy. \$10,000 7 Year Convertible Term. Date policies Jany. 28, 1911.

b. Amount of Insurance? Twenty Thousand. \$20,000.00.

c. Shall the premiums be payable during the whole term of Policy? No. Yes.

d. If not, during how many years shall the premiums be payable? 20 years.

e. Premium, \$38.20 Annually, \$— Semi-Annually, \$— Quarterly.

If a Participating Policy, the dividends unless otherwise requested shall reduce premiums or be paid in cash.

7. What is the Name, Residence, and Relationship of the person to be benefited by this Policy in event of your death? (If not a near relative, state what interest the proposed beneficiary has in your life.) My estate.

It is desired that the Policy be written with respect to the Beneficiary as nearly in accordance with the above request as the experience of the Company will suggest as being most likely to meet the requirements, and the acceptance of the Policy so written will be regarded as an acknowledgment that the Company has complied with the wishes of the applicant.

8. Have you personally employed or consulted any Physician during the last five years? If so, give names and residences of all. I have not.

9. Has any proposal or application ever been made or submitted to any Company, Association, Agent or Physician, for which insurance on your life is now pending or has not been granted for the full amount, and of the same kind as applied for? If so, state particulars, and the names of all such Companies, Associations, Agents or Physicians. No.

10a. What amount of insurance is now in force on your life, and in what Companies or Associations? \$10,000 State Mutual Life, Rome, Ga.

b. Approximate dates of last insurance granted by each. Jan. 28, 1907, State Mutual Life Rome Ga.

11. Has any Physician, Company, Association or Agent ever expressed an unfavorable opinion on your life with reference to life insurance or refused to reinstate insurance that had lapsed? If so, state particulars. No.

(Use this space for further explanations to the above questions if necessary.)

Dated Dec. 17, 1910. Witness H. B. Alexander. Applicant sign here. Wiley J. Dunken.

(The Answers to the following questions must be filled in by the Examining Physician who must also witness the signature of the applicant below. If further explanations to any of the following answers are necessary, be particular to use the blank lines at the foot of this page, noting the number of the question to which the explanation applies.)

Use Good Black Ink Only.

12. Family record:

Living			Dead		
Age?	Health?	Age?	Cause of death?	Date of death?	
Father .....	..	44	G. S. W. in Civil War	1884	
Father's Father..	..	Aged	Senility	....	
Father's Mother..	..	Aged	Senility	....	
Mother .....	..	39	Texas Fever	1882	
Mother's Father..	..	Aged	Senility	....	
Mother's Mother..	..	Aged	Senility	....	
5 Brothers.....	29	Good			
.....	34	Good			
.....	36	Good	27	Pneumonia-Acute	1893
.....	38	Good			
Sisters .....	45	Good	18	Texas Fever	....

13. Have you ever had any of the following diseases? (Answer yes or No, opposite each. If Yes, state the date, duration and severity of illness with full particulars.) Abscess, no; Apoplexy, no; Appendicitis, no; Asthma, no; Bronchitis (Chronic), no; Consumption, no; Disease of the Heart, no; Disease of Liver, no; Dropsy, no; Enlargement of Glands, no; Enlargement of Veins, no; Fits, no; Fistula, no; Gall Stone, no; Gout, no; Gravel, no; Habitual Headache, no; Hip Joint Disease, no; Jaundice, no; Neuralgia, no; Paralysis, no; Rheumatism, no; St. Vitus's Dance, no; Spitting of Blood, no; Syphilis, no; Tumors, no; Ulcers, no; Venereal Disease, no; Vertigo, no.

14. Have you had Inflammatory Rheumatism? If so, state severity and date of each attack. No.

15. Are you subject to Dyspepsia, Dysentery, or Diarrhœa? No.

16. Have you had during the last seven years, any disease or severe sickness? If so, state the particulars of each case, and the name of the attending physician. No.

17. Have you either gained or lost weight during the last five years? If so, state particulars. Neither.

18. Have you ever changed your residence on account of your health? If so, state particulars. No.

19. Have you during the last five years lived in the same house with any one suffering from consumption? If so, state particulars. No.

20. Which parent do you resemble in height, weight and general characteristics. Father.

21. Have you ever been intemperate in the use of either malt or spirituous liquors, or used any drug habitually? No.

22. Do you use either malt or spirituous liquors daily or nearly every day? If so, what is used and the approximate amount? No.

23. Have you ever taken any cure or treatment for any habit? If so, what, and when? No.

(Additional Questions to be answered when the Applicant is a Woman:)

24a. Are you married? \_\_\_\_.

b. How long married? \_\_\_\_.

c. Number of labors? \_\_\_\_.

d. Date of last labor? \_\_\_\_.

25a. Were labors normal? \_\_\_\_.

b. Have you miscarried and if so from what cause and at what dates? \_\_\_\_.

c. Are you now pregnant? —.

26a. Is your menstruation regular and normal? —.

b. Is there any organic disease of uterus or appendages, or is any suspected?

c. Are there any tumors in the breasts or any other part of the body? —.

27. If a widow, state date and cause of husband's death? —.

Dated at Nashville, Tenn., this 17 day of Dec. 1910.

In presence of J. W. Handly (Examining Physician).

Applicant must sign here (Write the Christian name in full.) Wiley J. Dunken.

Medical certificate on the reverse of this page.

[fol. 72k] [Endorsed:] No. 152,775. Aetna Life Insurance Company of Hartford, Conn. On the life of Wiley J. Dunken. Sum Insured, \$10,000. Annual Premium, \$277.70. Age, 32. Date, January 28, 1911. Examined by J. R. E. Premiums payable during 20 years or until prior death. Insurance payable at death. Non-participating.

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[fol. 72½]

## EVIDENCE: EXHIBIT No. 28

Introduction, by plaintiff, of Exhibit No. 28, same being Loan Form No. 378, not signed, on Contract No. 152775, as follows:

Form No. 378.

Ed. of May 1907.

For use when a portion of a loan is to be applied towards payments of a premium.

This form should be dated and signed by the person or persons who execute the loan papers.

Dated —, —, 191—.

The Aetna Life Insurance Company, of Hartford, Conn., is hereby directed and authorized to deduct part of the premium due on account of change of plan and the Jan. Premium 1916 on Contract No. 152775 issued by said Company, from the proceeds of a loan of \$1,050—applied for by the undersigned, under said contract.

It is hereby agreed that the part of said premiums shall not be considered as paid, nor the said Company bound thereby, until the Home Office has granted the loan above mentioned and issued a check for the excess, if any.

Sign here: — —.

## EVIDENCE: EXHIBIT No. 29

Introduction, by plaintiff of Exhibit No. 29, same being Loan Agreement, not signed, as follows:

Form No. 547.

For Pals. issued sub. to 6-1-07 Except Paid-ups.

*Loan Agreement*

Policy No. 152,775

\$1,050.

For Value Received, I promise to pay to the Aetna Life Insurance Company of Hartford, Connecticut, the sum of One thousand and fifty Dollars, with interest at the rate of six per cent. per annum, payable annually in advance (the first year's interest to be deducted from the amount received hereon), and I acknowledge the amount of this note, with interest that may accrue to be an indebtedness to said Aetna Life Insurance Company on account of Policy No. 152775 issued by said company on the life of Wiley J. Dunken which policy with all right, title and interest therein, and all benefits to be derived therefrom, is hereby pledged to said Company as security for the payment of said indebtedness.

[fol. 73] I hereby agree that when any interest on this note becomes due and is not paid, the same shall be added to and become a



part of the principal indebtedness evidenced by this note and subject to the same rate of interest.

I further agree that all payments hereon, whether of principal or interest, shall be made at the Home Office of said Company at Hartford, Connecticut, or to an agent whose authority for receiving the same shall be the possession of this note or a receipt signed by an executive officer of said company.

I hereby certify that I am the owner of said policy duly authorized to pledge the same as security for this note, and I also certify that said policy has never been assigned or transferred to any person or party.

I further certify that I am not now adjudged insolvent, nor have I made a general assignment for the benefit of creditors that remains unsatisfied.

Witness my hand and seal at —, State of —, this — day of —, 191—.

(Sign here:) — (L. S.) — (L. S.)  
 — (L. S.) Witnesses: See below. Name: —  
 —, Address: —. Name: —, Address: —.  
 Name: —, Address: —. Name: —, Address: —.  
 Name: —, Address: —. Name: —, Address: —.  
 —, Address: —.

[fol. 74] NOTICE.—Each signature on this form should have two witnesses whose addresses must be given.

#### ADMISSIONS

##### *Admission as to Death of Dunken and Non-payment of Note*

It is admitted that Mr. Dunken died on or about June 1st, 1916, and that Mr. Alexander had this note for \$106.45 at his office at the Nashville Agency at the time of Mr. Dunken's death on or about June 1st, 1916. It is further admitted that in response to a letter from the firm of Forrester & Stanford, making inquiry about this note and asking for a copy of it, that Mr. Alexander made this endorsement which appears on the face of the note, and mailed the note to Forrester & Stanford, attorneys for plaintiff. It is further admitted that the note has not been paid (this admission has reference to Exhibit 21, shown on page 26 of this statement of facts).

##### *Admission with Reference to Authority of J. L. English*

It is admitted by defendant, that J. L. English is vice president of the Aetna Life Insurance Company of Hartford, Connecticut, and is authorized to act as agent for the Company.

*Admission in re Letter of Mar. 4, 1916, and Enclosures Therein Contained*

It is admitted, by defendant that letter dated March 4, 1916, together with enclosures contained in it, and that policy 152775 and loaned papers, were all found in Dunken's iron safe after his death where he kept his other valuable papers and had been there from the time he received them. (Except 26, page 32 of this S/F).

*Portions of Deposition of H. B. Alexander, Offered by Plaintiff*

Introduction by plaintiff, of the following portion of the Deposition of the witness H. B. Alexander, same being read from the statement of facts on the former trial of this case, and copied therefrom as follows:

It is true that when I took the extension note for \$106.45, dated February 26th, 1916, on form No. 71, that I filled out form No. 71-a and sent it to the home office, as the rules of the Company required me to do.

[fol. 75]

*Admission*

It is admitted that Form No. 71 is a note, and Form No. 71-a is a copy of note that was sent to the Home Office, which they had there during the time they made this conversion.

**EVIDENCE: EXHIBIT No. 30**

Introduction, by plaintiff, of Exhibit No. 30, same being a portion of the Book of Rules of the defendant company, copied from the statement of facts on the former trial of this case; this portion of said Book of Rules, offered at this time, being Section 20, headed Delivery of Policies, and sub-divisions *a*, and *b* as follows:

**Section 20. Delivery of Policies**

*a.* An agent must not delivery a policy unless settlement has been obtained for the first premium, except that in special cases the policy may be left for inspection provided a proper receipt is taken on the company's form. (See Section 21, Paragraph J.)

*b.* An agent must not deliver a policy more than sixty days after its date without special permission in writing from the company, nor within the sixty days unless he knows or has positive assurance from reliable sources that the persons whose life is to be insured is in as sound health and equally as acceptable for life insurance as when the medical examination was made. Whenever the above mentioned period of 60 days ends on a Sunday or a legal holiday, the premium may be accepted under the conditions described above on the next succeeding business day, but not thereafter. \* \* \*

## EVIDENCE: EXHIBIT No. 31

Introduction, by plaintiff, of Exhibit No. 31, being another excerpt from the Book of Rules of the Defendant corporation, being Section 21, headed Collection of First Premiums, and sections *a* and *b* thereunder, as follows:

## Section 21. Collection of First Premiums

*a.* All collections must be accounted for in the first report rendered after such collection.

*b.* Every policy which has not been delivered must be returned to the company within sixty days after its date (see Sec. 20-A) accompanied by form 113 duly executed, giving the reasons for non-defol. 76] livery. No policy will be credited unless this provision is observed. \* \* \*

## EVIDENCE: EXHIBIT No. 32

Introduction, by plaintiff, of Exhibit No. 32, being an excerpt from the Book of Instructions of the defendant company, being as follows:

NOTE.—In special cases the policy may be given to the applicant for examination, provided that he gives an acknowledgment reading as follows, which acknowledgment may be returned to him when the premium is paid:

"This certifies that I have received policy No. — in the Aetna Life Insurance Company, not as a delivery of the insurance, but for the purpose of examination only; that the premium on same has not been paid, and that no insurance is to take effect until the first premium thereon has been actually paid within the conditions of said policy.

"Even this course should be taken very rarely, and only when required by the applicant, and then with the understanding that the policy is to be returned within three days if settlement for the premium is not made."

## EVIDENCE: EXHIBIT No. 33

Introduction, by plaintiff, of exhibit No. 33, being Note 2 in Book of Instructions, copied from statement of facts on former trial of this case, as follows:

## Note 2 in Book of Instructions

NOTE 2.—Agents should take notice that no form 71½ will be approved unless it is actually executed on or before the day when the previous extension expires or the policy lapses. Policy-holders who

have taken extensions on any form should be notified of the fact some time before their notes mature.

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*Admission*

It is admitted that plaintiff offered to make proof of death and the company waived proof of death, as required to make statute effective, provided the statute is applicable in the case as to the 12% of the penalties.

[fol. 77] It is further admitted that Mr. Wiley J. Dunken died on or about June 1st, 1916, and proof of death was waived, and statutory requirements, in order to recover 12% damages and reasonable attorneys' fees were complied with, provided the statute is applicable in this case.

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EVIDENCE: PORTION OF DEPOSITION OF H. B. ALEXANDER, OFFERED  
BY PLAINTIFF

Introduction, by plaintiff, of the following portion of the deposition of the witness H. B. Alexander, both the question and answer being read as follows:

Cross-interrogatory No. 5. Is it not true that you as general manager was required to make, and did make monthly reports to the home office about the last day of each month? If you say the above is not true, then when and how often were you required to make reports to the home office? Did you make any report to the home office for the months of March, April and May, 1916? If so, have you copies of such reports? What reference if any was made to the Dunken insurance in these reports, and if any reference was made to the Dunken Insurance, then you will please attach a copy of such reports and have the Notary mark the same so as to identify same.

Answer. It is true that I was required to make monthly reports to the home office at the last of each month, and also at that time I was required to make semi-monthly reports, which were made on or about the 15th and 30th of each month. Yes, I made a report to the home office for the months of March, April and May, 1916, and I have copies of such reports, and my report of the 29th day of February, 1916, shows that I returned to the company the renewal receipt under the Dunken Policy No. 98322, and I herewith attach a copy of said report pertaining thereto, and file it as Exhibit No. 1, to this my deposition.

(Exhibit receive-, so marked, and is attached hereto and made a part hereof. Norton, N. P.

## EVIDENCE: EXHIBIT No. 34

Introduction, by plaintiff, of Exhibit No. 34, same being Exhibit No. 1 attached to the deposition of the witness H. B. Alexander, as follows:

[fol. 78] *Policies, Renewals, Revival and Interest Receipts Returned Herewith for Cancellation This 29 day of February, 1916*

— — —, Manager

(Following in typewriting:)

Policies	Renewals	Int. receipts	Rev. receipts
402,957—Whitaker—12/24	....	....	\$16.68
404,202—Jones—12/1	....	....	9.00
428,894—Matthews—11/27	....	....	3.66

(In Ink:)

98,322—Dunken—1/28	....	....	....
135,453—Cullum—1/9	....	....	....

(Endorsed across face in ink as follows:) "Pearl S. Dunken, Admn. vs. Aetna Life Ins. Co., Ex. No. 1 to Dep. of H. B. Alexander, Jno. J. Norton, Notary Public." (Seal.) See other side for instructions.

(On opposite side:)

*Instructions*

Return with this Form the following:

1. All policies on which the days allowed for delivery have expired.
2. All renewals where grace (31 days) has expired and no extension of time by Form 71 or 71½ has been granted.
3. All renewals where extensions have been granted by Form 71 or 71½ and the notes have not been paid at maturity.
4. All Revival Receipts where grace (31 days) has expired and no extension by Form 71 or 71½ has been granted.
5. All Revival Receipts where extensions have been granted by Form 71 and 71½ and the notes have not been paid at maturity.
6. All interest receipts which are 60 days overdue.



PORTION OF DEPOSITION OF H. B. ALEXANDER, OFFERED  
BY PLAINTIFF

Introduction, by plaintiff, of the following portion of the deposition of the witness H. B. Alexander, being read from the statement of facts on the former trial of this case, as follows:

W. J. Dunken was notified that his note for \$106.45, dated February 26th, 1916, was due, as stated in the note, and as *stated in the note, and as* to what correspondence was had directly on this will be shown by the letters and correspondence as filed with the court in this case, provided I kept copies of such correspondence, but, as above stated, most of the notices of extension notes and premiums [fol. 79] were sent out on printed forms of which no copies were kept.

I think it is true that I had in my possession at the Nashville agency the note for \$106.45, dated February 26th, 1916, at the time of Mr. Dunken's death. I can not say that I asked him directly to pay this note for it was to be absorbed in the payment of the back premiums to which I have above referred, for he signed the extension note only to keep the policy in force until he would complete the papers and payments necessary under the conversion of the new policy.

I wrote Mr. Dunken on March 4th, 1916, enclosing him the new policy No. 152775, as stated in my letter, and I presume all the conditions to the delivery of said policy are stated in said letter, of which I have no copy but same was furnished to the court and is now on file there.

It is not true that I did not ask Mr. Dunken to return policy No. 152775 for I plainly stated to him in my letter of March 4th, 1916, that certain loan papers were necessary to be signed and certain cash payment was to be made, and that the policy was to be returned to me.

I do not recall when I last saw Mr. Dunken, I think it was about two or three years after the term policy No. 98322 was issued.

I conducted all of the negotiations and correspondence with Mr. Dunken either in person or through my office regarding the conversion of his term policy No. 98322 into his commercial pay policy No. 152775. I have not the correspondence before me for reasons stated in the foregoing answers, but I presume it was on or about January 29th, 1916, and I am not prepared to say whether my negotiations and correspondence was closed by my letter of March 4th, 1916, but that is the last letter of which I have any copy. Yes, I had authority from the company to conduct such negotiations and correspondence and to do all that I did, except my instructions from the company were when I was sending out a policy simply for inspection to use receipt, form No. 359, which I file herewith as Exhibit No. 2, to this my deposition, which receipt would show that the policy was sent for the purpose of examination only. I do not find copy of any letter where I notified Mr. Dunken that the negotiations for the conversion of said term policy were off.

[fol. 80] (The above Exhibit No. 2, attached to this deposition, has already been offered in evidence during the trial of this case, and is shown as Exhibit No. 32 p. 44 in this statement of facts.)

Mr. English knew, or the home office knew, that Mr. Dunken desired a loan on the new policy, for I am sure that I notified him to this extent and that is the reason why he enclosed the loan papers.

It is true that the cashier in my office is appointed by the home office and is under the direction and control of said office. It is also true that the books in my office are furnished by the home office and are kept to the best of our ability as required by the home office, and that all such books, papers and documents are open to the home office at all times.

It is part of my duties as manager to deliver or supervise the delivery of all policies, and the period of time over which this has extended has been since I became manager of the company.

(At this juncture recessed until 9:00 a. m.)

Morning Session, May 31, 1921

#### ADMISSION

##### *Admission in re Permit of Defendant Company to do Business in Texas*

It is admitted, by both plaintiff and defendant, that at the time the new policy sued on in this case was issued and sent out, on February 28th, 1916, that at that date the defendant company had a permit to do business in Texas, and was at that time engaged in the business of writing life insurance in this state.

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#### AGREEMENT IN RE EVIDENCE IN REGARD TO REASONABLE ATTORNEYS' FEES

##### *Agreement*

It is agreed, by both plaintiff and defendant, that the testimony adduced on the former trial of this case may be read in evidence at this trial, and that both the direct and cross-examinations will be read, one following the other, in the same order as though the witness were on the stand.

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ALVA BRYAN, a witness for the plaintiff, whose testimony was read from the statement of facts of the former trial, testified as follows, on direct examination:

[fol. 81] Examination by Mr. Spell:

My name is Alva Bryan. I am a practicing attorney, engaged in the general practice of the law at Waco, Texas, and have been in

June it will be fourteen years since I came here. During that fourteen years I have had a varied general practice.

Taking a suit against the Aetna Life Insurance Company upon an insurance policy for ten thousand dollars insurance on the life of Wiley J. Dunken, Mr. Dunken having died about June 1st, 1916, the insurance company contending that the policy was lapsed by reason of non-payment of premiums, and that the contract with Mr. Dunken is therefore null and void; the contention upon the part of the plaintiff, Mrs. Dunken, the surviving widow of Wiley J. Dunken, is that these policies one or the other, and also assuming in this connection that in 1911 the Aetna Life Insurance Company sold to Mr. Wiley J. Dunken a policy for ten thousand, a term policy, giving a privilege of converting that into a life commercial policy—twenty pay life commercial policy within the seven years, and within five years if he saw fit to do so without an additional medical examination. At the expiration of five years, Mr. Dunken and the general Agent, Mr. Alexander, of the company, he proceeded to convert it into a twenty years pay commercial life policy, and that policy was delivered to Mr. Dunken therefore at that date of his death the policy was in Mr. Dunken's possession, and the term policy was in the possession of the insurance company, but in order to protect the term policy during the negotiations, about converting it into the twenty pay life policy an extension note was given to protect the validity of the old policy until the negotiations concerning the new was completed. That at the time of his death the situation was about that, the plaintiff contending that one or the other of the policies was a subsisting valid contract; that there is involved in this controversy the questions of waiver, the doctrine of estoppel, what constitutes delivery, and all of the law with reference to that. The pleadings of both parties are voluminous and required a great deal of time and preparation of the same, and there was a great deal of work done in order to obtain the facts necessary for the proper preparation of the pleadings and the [fol. 82] case for trial; doubtless involving work in the Appellate Court of this state; that the case is being tried with that in view. With that statement of the case, the suit having been filed in the early part of the fall or last summer, either in August or September, or some time about, and the policies being for ten thousand dollars each—with that statement of the case, amount involved and local questions involved, my opinion as a lawyer as to what would be a proper and reasonable remuneration by way of attorneys' fees, I should think a fee of from two to three thousand dollars; that is if you expect to follow it all through the other courts, the Appellate Courts and the Supreme Courts, keeping that in view.

#### Cross-examination.

#### Examination by Mr. Moroney:

The amount of work and investigation required in the case would be one of the factors upon which my opinion would be based. I was taking it as a whole as submitted to me by Judge Spell. I took the

amount of the policy as ten thousand dollars as one of the factors, and the amount of the work done and that is to be done as another factor. With reference to whether my opinion would be modified if it should appear that the work was in fact not laborious, that, of course, would depend upon the amount of it. The amount involved. I am talking for myself and what other lawyers I know charge. They are governed to some extent by the amount of money involved, and it is true that in cases of this kind against insurance companies, especially where the statute makes provision with reference to attorney's fees, that those fees should be liberal. The statute does not use the word "liberal." As to the language of the statute, I never try to quote the statutes. I never risk my memory about those things. My old professor in the University told me to never undertake to quote the statute, but to look it up. I have undertaken to carry out his advice. My practical interpretation of the statute is that it should be construed as meaning liberal.

If I was bringing a suit on a ten thousand dollars promissory note, a fee of ten per cent would not be liberal, not under some cases. I have just got out of a case in which I recovered judgment for \$23,000 [fol. 83] on the notes, but I got twice or three times that much as a fee. That is not a set rule at all. I was speaking about attorneys' fees. Ten per cent is not the criterion at all all the time.

Ten per cent is the usual attorneys' fee clause in a note. As to whether that is practically the uniform custom in Texas, that depends upon the character of the instrument upon which you sue. I think promissory notes perhaps either provide for ten per cent or reasonable attorneys' fees. I think that nearly all provide specifically for ten per cent.

If it should appear that in this case there was no particular labor in getting at the facts because the company made full and complete disclosure of every fact in the case, that there was no difficulty in getting at the actual facts in the case at all, no reluctance on the part of the company in disclosing every fact within its knowledge as shown by its record so that the case would reasonably present no more difficulty than a suit on an ordinary promissory note with some ordinary defense to it; as to what any judgment would be about it if that should be the case, I don't know about that question. You say some kind of defense. I would like to know what kind of defense you have reference to with reference to your question. You know that even on a promissory note it may have varied defenses, and some of those defenses are much more difficult than others.

Taking a case where the representatives of the estate of the deceased ask the company for all the facts connected with it and the company frankly and properly made a complete disclosure of every fact inquired about and gave copies of everything that they requested, and there is no question about the correctness of that disclosure so that there is practically no controversy about any facts in the case—no occasion for taking depositions or subpoenaing witnesses, except experts and where that was the policy and the practice of the company right from the first from the beginning of the transaction,  
\* \* \* I would say that 10% was a reasonable attorney's fee. Sup-

posing the facts are undisputed and fully disclosed at request so that it becomes simply a question of law, just practically eliminating the labor of investigating the facts and getting testimony on the facts, and it becomes merely a question for the court to pass upon as to [fol. 84] whether or not under these undisputed facts the company is liable, as to whether that would effect my judgment would depend also; from my experience sometimes legal questions are more difficult than fact questions and it would depend entirely upon the amount of investigation that the lawyer would have to do in briefing his case, both in the trial court and the upper courts. Supposing the fact questions are eliminated, and I had nothing but the legal questions to work over, that would depend entirely upon the amount and extent in variedness of the legal questions involved. As to whether the amount of a reasonable fee depends at least in part upon the amount of labor required in the preparation and conduct of the case, I would say partially so.

If, as a matter of fact, there was not very much labor except such labor as actually may have been required to be in examining the authorities, that would, to some extent, effect my judgment of the matter. Of course that would depend entirely upon the amount of work I would do, the legal work, and also to that I would attach the amount of money involved. Always keeping in mind that it being a life insurance company, the statute I think should be construed as meaning a liberal fee, that is, only anywhere where the statutes provide for reasonable attorney's fees. I may have one opinion about it and you, as attorney for the insurance company, would have another one. All of our opinions don't agree on these things.

Redirect examination.

By Mr. Spell:

With reference to notes providing for ten per cent attorneys' fees, that applies to collection without a contest, usually.

Lawyers are not altogether guided and governed by the provision for ten per cent attorneys' fees in litigation where promissory notes are involved. It depends upon the defense that is made to the note.

For the purpose of securing my professional opinion as to the accuracy of a fee, take a suit against a life insurance company, represented by distinguished foreign counsel, and witnesses from different parts of the American Union, and every phase of it contested vigorously from a lawyer's standpoint—the doctrine of estoppel is involved, validity of an instrument is involved, and no fact that was [fol. 85] not already in our possession admitted by the lawyers in the case had to pursue the best methods possible to ascertain those facts and procure them, and further keeping in view that the insurance company is trying it with the view of appealing from one court to another, and this involves the work of preparing the record, briefing the case, oral arguments before the various courts of Civil Appeals and the Supreme Court of the state—taking into consideration all of those facts, and ten thousand dollars involved, as to whether three



thousand dollars would be an extravagant fee, I think the fee I stated would be a reasonable fee.

#### ADMISSION

It is admitted by counsel for both sides that since the above witness, Mr. Alva Bryan, testified in this case, that this case has been before the Courts of Appeals twice, in each instance briefs were filed by the respective parties, oral arguments had before the higher courts both times, also an attempt was made upon the part of the insurance company (defendant) to obtain a writ of error from the Supreme Court of the state, which also involved the labor of briefing and presenting the application on the part of the insurance company's attorneys, and resisting it on the part of the plaintiff's attorneys.

Mrs. PEARL STONE DUNKEN, plaintiff herein, having been first duly sworn on oath, testified as follows:

Direct examination.

(By Judge Spell:)

My name is Mrs. Pearl Stone Dunken. I am the surviving widow of Wiley J. Dunken, and I am the Administratrix of the estate of Wiley J. Dunken. I have lived in the City of Waco and in McLennan County all of my life. My father was J. E. Stone of this City and county.

Mr. Dunken and I were married June 9th, 1907. We were married in this City—Waco. After our marriage, Mr. Dunken and I lived in Atlanta for a few months, and then we moved to Nashville, Tennessee. We lived in Nashville, Tennessee for about two years [fol. 86] and a half. I believe that the years that we lived in Nashville, Tennessee, were '10 and '11—1910 and 1911.

Mr. Dunken died on June 1st, 1916, and after his death I procured from his private papers some insurance policies. I procured those policies out of his safe at home—I mean his iron safe. That was the receptacle in which he kept his private papers. I found these two policies that are in question in this lawsuit in his safe. I found this last policy, that is the subject of this lawsuit, or the one that he had changed from the term policy to a twenty pay life, I believe, or the one that is in question here, in his safe also—in the iron safe, which was in his residence. That is the receptacle in which he kept his valuable private papers. The letters that have been introduced in evidence here by myself, or by my counsel, I obtained from among Mr. Dunken's effects. Some of them were in this iron safe. At the time of Mr. Dunken's death, he and I were living at Twenty-second and Barnard. I turned over to my attorneys all of the papers that I found in Mr. Dunken's safe pertaining to these policies, and these papers have been introduced in evidence

on the trial of this case. It was after Mr. Dunken's death that I found this life insurance policy, and the letters that I turned over to my lawyers in the case, which have been introduced in evidence.

At the time of his death, Mr. Dunken was in Llano, Texas. He died at Llano, Llano County, Texas. At the time of his death, Mr. Dunken had been away from home four weeks. After his death, in looking through this safe where he kept his papers and letters pertaining to this policy, I did not find any notice from the insurance company, or any letter of any kind, notifying him of the maturity of this \$105.00 note. All of the papers and communications that I found in Mr. Dunken's safe, and in his private files, relating to this insurance policy, were turned over to my attorneys, and all of those papers have been introduced in evidence in this trial.

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#### ADMISSION

It is admitted in this connection, that the deceased, Wiley J. Dunken, had possession of the policy from the time it reached here [fol. 87] (Waco), and that in due course of mail, it ought to have reached here within two or three days after it was mailed from Nashville, Tennessee; that it was mailed on the 4th day of March, and reached here in due course of mail.

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Witness continuing: I said Mr. Dunken, prior to his death, had been away from home about four weeks. He must have left Waco, on the last trip to go down to Llano, about May 1st, and from say January 1st, 1916, to June 1st, 1916, Mr. Dunken was at home very little. He was merely in and out of the City during that time, and was going to different points of this state, and also in other states, looking after his affairs. During that time, the mail that accumulated that was addressed to him, was sent to him by me. I sent it to him. I could not say whether on his return he brought any of that mail back with him or not.

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#### ADMISSION

#### *Admission in re End of Correspondence Between Deceased and Defendant*

It is admitted by counsel for defendant, that the records show that the letter of March 4th, 1916, was the end of the correspondence between Mr. Dunken and the defendant company or its agents, and that Mr. Dunken received no further notice from the company.

## Cross-examination.

By Mr. Moroney:

This letter of March 4th to Mr. Dunken, enclosing the new policy, and the propose- loan papers, were found by me in Mr. Dunken's safe after his death. That letter had been opened by Mr. Dunken, and placed in the safe by him. I think that letter would have been received along about March 6th or 7th. I could not say whether Mr. Dunken was in Waco, at home, at that time or not; I couldn't say exactly whether he was or not. He was here shortly afterwards, or then. You are not asking me how long he remained here, but he was here long enough to get his mail and read it. That is correct, but I couldn't say whether he was here when the letter came or not; he was in and out so much.

I said that I found these two policies of Mr. Dunken's in his safe. One of those policies was this policy that was enclosed in Mr. Alex- [fol. 88] ander's letter of March 4th. That is correct. The other policy was the twenty pay life policy that was issued to Mr. Dunken at Nashville, and which has not been changed, or attempted to be changed. That is correct.

In my former testimony it seems that I testified that Mr. Dunken died at Llano, or near Llano, on or about June 1st. That is correct. I believe that I also testified that he had been away then about four weeks, which would be during the greater part of May. Before leaving on or about the first of May, he had been home.

We were both living in Nashville, Tennessee when this insurance was originally written in 1911.

When I first testified in this case, referring to that letter dated March 4th, 1916, it appears that I testified as follows: "Question: That letter would naturally have reached here about the 6th or 7th of March, wouldn't it?" "Answer: Yes sir." "Question: From Nashville. Where was Mr. Dunken then, if you remember? Was he here?" "Answer: I think he was here, yes sir." "Question: You think he was here?" "Answer: Yes sir." "Question: How long did he remain here?" "Answer: Well, not very long." "Question: A week or two, or a few days?" "Answer: I don't know just what date he went to Clovis." "Question: But he was probably here several days at least on that occasion?" "Answer: I couldn't say." That testimony is correct.

## Redirect examination.

By Judge Spell:

I think that testimony is correct.

Plaintiff rests.

## DEFENDANT'S TESTIMONY IN CHIEF

*Agreement*

It is agreed, by and between attorneys for plaintiffs and defendant, that the statute law of Tennessee and Connecticut is correctly stated in the defendant's Trial Amendment filed the 30th day of October, 1919, but that whether same is applicable or not in this case is a question of law to be determined. It is also agreed that said trial amendment is considered a pleading at the present trial without amending defendant's answer to which said trial amendment applies.

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[fol. 89]

## EVIDENCE: EXHIBIT No. 35

Introduction, by defendant, of exhibit No. 35, being Sub-division D, Section 22, Instructions to Agents, in book of instructions, entitled Collection of Renewal Premiums, same being read from the statement of facts on the former trial of this case, and is as follows:

"d. Form 71-A, which is attached to the blank note 71 is to be filled out at the time the note is taken and must be signed by the person who signs the note, and forwarded to the Home office without delay. At the same time Form 72 must be countersigned by the agent and given to the insured or beneficiary who has signed the notes. (Where it happens that a premium is being collected by one general agent for another and form 71 is given, the correspondence should invariably show the name of the agency to which the renewal receipt is charged by the company.)"

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## EVIDENCE: EXHIBIT No. 36

Introduction, by defendant, of Exhibit No. 36, being a letter of date 2/24/1911 to Mr. J. L. English, V. P., from H. B. Alexander, Manager, Nashville, Tenn., as follows:

Form 175

Aetna Life Insurance Company of Hartford, Conn.

Morgan G. Bulkeley, President

Agency at Nashville, 2/24/1911.

Mr. J. L. English, V. P.:

Please find enclosed Po. No. 98322 and form 673 for conversion.  
Please send loan papers for the 6th year loan value when the Pol. is converted.

Please give this immediate attention for the insured is leaving in a few days for a vacation and I want to get the papers duly signed by him before he leaves his present address.

Yours truly, H. B. Alexander, Mgr.

(Copied from statement of facts on former trial.)

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EVIDENCE: EXHIBIT No. 37

Introduction, by defendant, of Exhibit No. 37, being an excerpt from Authority of Agents, from the book of rules of the defendant Company, as follows:

Section 1. Authority to Agents.—Licensed agents of this company are authorized to solicit applications for insurance upon its regular plans and rates and to receive premiums on policies issued therefor, and to conduct the business of their agencies in all respects in conformity to the instructions issued from time to time by the company. [fol. 90] They are not authorized to accept risks, nor to alter or waive any of the conditions of policies or renewal receipts, nor to issue permits of any sort, nor to bind the company by any promise or agreement, nor to incur any expense in the name of the company. All agreements or obligations of the company are signed by its President, Vice-President, Secretary, Agency Secretary, Assistant Secretary, Treasurer, Assistant Treasurer or Auditor.

Section 19. Notice of premium due.—

a. The company does not recognize any obligation to send a special notice to the insured calling for the payment of each premium before it becomes due, and agents should not promise to do so. The policies themselves are quite explicit as to the amount of each premium and the day on which it becomes due, and policy-holders should be instructed to rely upon the terms of the policies only. Nevertheless, it is the intention of the Company to forward to the general agents renewals for premiums early enough in the month next previous to that in which they fall due, so that notices can be forwarded to the insured and to assignees. Agents should always compare the renewals with their records and notify the Company at once if any are missing. It should be understood that renewals are not forwarded when the premiums on the same policies previously due have not been paid in full and reported to the Company at the time the renewals are being made, or whenever there is loan interest more than 60 days past due. This necessitates the utmost promptness in collecting and reporting quarterly premiums and loan interest, and all those agents and collectors who report to the general agents should report quarterly so promptly that they may be included in the report of such general agents to the Company made during the early part of the month next succeeding that in which they became due. Thus, every quarterly due in January should be



reported to the Company in the account rendered in February. Policy-holders should not be permitted to delay the payment of such premiums, and it is only on the assumption that quarterly premiums will be paid promptly that the Company has assented to extend this accommodation to its patrons.

[fol. 91] Section 20. Delivery of Policies.—

a. An agent must not deliver a policy unless settlement has been obtained for the first premium, except that in special cases the policy may be left for inspection provided a proper receipt is taken on the company's form (See Section 21, paragraph J).

b. An agent must not deliver a policy more than sixty days after its date without special permission in writing from the company, nor within sixty days unless he knows or has positive assurance from reliable sources that the person whose life is to be insured is in as sound health and equally as acceptable for life insurance as when the medical examination was made. Whenever the above mentioned period of 60 days ends on a Sunday or a legal holiday, the premium may be accepted under the conditions described above on the next succeeding business day, but not thereafter.

c. In cases where cash or note has not been taken and the agent is unable to effect delivery within the time allowed but has good reason to believe that he can do so soon after the company may be willing to grant an extension of time for delivery not to exceed thirty or sixty days additional, provided that before the time the premium is accepted or the policy delivered the agent shall obtain a certificate from the medical examiner who made the original examination (such certificate to be obtained without expense to the company) showing the insured then to be in as good health and insurance condition as when first examined. The agent must not, however, retain the policy longer than the time originally allowed unless he has received written authority from the Home office granting such additional extension.

Section 21. Collection of First Premiums.—

a. All collections must be accounted for in the first report rendered after such collection.

b. Every policy which has not been delivered must be returned to the company within sixty days after its date (see Section 20-A) accompanied by form 113 duly executed, giving the reasons for non-delivery. No policy will be credited unless this provision is observed [fol. 92] served.

c. Agents are not advised to accept notes in payment of first premiums, but are permitted to do so with the understanding that the company will in no event assume any responsibility for the payment of such notes, and they must not be taken in the name of the company. It is assumed that an agent will not take any note unless he knows the circumstances of the applicant and is confident that

the obligation will be met at maturity. When such a note is taken it should mature within sixty days from the date of the policy. But if an agent, on his own responsibility, decides to take a note for a longer period, he must nevertheless report the premium promptly at the end of the sixty days, not delaying for the note to mature. And whenever any note is discounted, as well as in every other case where cash is received for a premium, payment must be made to the Company in the first report rendered thereafter, and without waiting for the end of the sixty days. But notes must not be discounted before policies have been issued.

d. The foregoing does not apply to regular premiums following short term insurance nor to the second semi- and the second, third and fourth quarterly premiums, of the first year; such premiums renew the insurance, and the rules concerning the collection of renewal premiums only.

e. When a note is drawn for sixty days or less, and so accepted, can not be collected, if the agent returns it to the applicant, stating that the insurance is cancelled, and returns the policy to the Company before or shortly after the expiration of sixty days from its date, together with form No. 139-A legally executed by the insured on form No. 130 legally executed by the insured and all the beneficiaries, and also with satisfactory form No. 113, he will receive credit for the policy.

No policy on which a note has been taken should be returned to the company for credit unless the note has first been returned to the applicant, nor should the policy be returned to the company without the surrender forms duly executed as above directed. Policies on which notes have been taken for the premium will not be credited [fol. 93] unless satisfactorily released by Form 139 or 139-A.

f. When the Manager has reported the first annual or semi-annual premiums to the Company depending upon a note which he fails to collect, he may return the policy to the company within four months from its date (but not thereafter) at the same time furnishing a release on form No. 139-A signed by the insured, or on form No. 139 signed by the insured and all the beneficiaries, also stating on form No. 113 whether any portion of the premium has been paid in cash. The company may then give him credit for the premium, less commissions and cost or risk for the time the policy has been in existence, as determined by the short term rates shown in the rate book; but if a partial payment collected by the agent exceeds the cost of risk, no portion of the partial payment will be returned. It should be observed that in no case where a note has been taken for the whole or part of the premium, will the policy be credited by the Company unless it is duly surrendered by the use of form No. 139 or No. 139-A.

## Section 22. Collection of Renewal Premiums.—

a. Thirty-one days of grace are allowed for the payment of any premium after the first, provided that with the payment of such premium interest is also paid thereon for the days of grace taken. The

report blanks are provided with a special column in which must be entered in every case the exact date when the premium is paid to the agent by the insured. If this date shows that advantage was taken of any days of grace, the interest, however small in amount, must be paid with each premium, and entered in the interest column opposite. In any case where settlement is not made within said thirty-one days, the receipt must be returned to the company for credit, and the insurance may thereafter be revived only at the discretion of the company. (See Sec. 16.) (NOTE.—This section applies also to regular premiums following short term insurance, and to the second semi-annual and second, third and fourth quarterly premiums of the first year.)

b. If a renewal premium can not be collected in cash as above, the agent may, before the thirty-one days of grace expire, accept a note [fol. 94] signed by the insured or the beneficiary on Form 71, to mature sixty days of the date when the premium fell due.

c. Interest from the date of the renewal must be added to the note and paid to the company when the premium is reported. The rate of interest to be charged on this Form, and also for the days of grace, shall be the prevailing rate in that locality, not less than 5 per cent in any case nor more than the lawful rate, and the whole amount of interest so collected must be reported and paid to the company, where premiums are payable quarterly, the insured should not expect that extension notes will be accepted, but if such a note is taken, and paid at maturity, the agent must at once call on the Company for the receipt for the next quarterly payment. This requirement must be carefully observed. Any partial cash payment made in advance of the anniversary must be accompanied by a note on Form 71.

d. Form 71-a which is attached to the blanket note 71 is to be filled out at the time the note is taken and must be signed by the person who signs the note, and forwarded to the Home Office without delay. At the same time Form 72 must be countersigned by the agent and given to the insured or beneficiary who signed the note. (Where it happens that a premium is being collected by one general agent for another and form 71 is given, the correspondence should invariably show the name of the agency to which the renewal receipt is charged by the company.)

e. No other form of note is to be accepted, and the above should be taken only in those cases where the risks are believed to be good and desirable for the company to continue, and where there is good reason to believe the notes will be paid at maturity.

f. When taking form 71, if the agent collects any portion of premium in cash, he should state the amount so collected on Form 71-a. And he should never, under any circumstances, neglect to notify the company of any partial cash payment received on account of a premium or interest item.

g. No cash payment should be accepted in partial payment of a renewal premium unless a note on form 71 (or 71½ as the case may be) is also executed and form 72 (or 72½) given to the insured. [fol. 95] This applies also where partial payments are accepted prior to date when premiums become due.

h. Where no objection appears, the Company will, in extreme cases, grant further extensions which are not in any instance intended to exceed four months from the date when the premium became due on annual payments, or three months on semi-annual payments, provided that the insured will pay in cash not less than the short-term rate at his attained age, from the date of the renewal to the end of the extension, and will also give his note on form 71½ for the balance of the premium, adding to the note the interest for the same period, but said cash payment must not be accepted unless form 71½ is actually signed on or before the day the first extension expired. Every such note must be promptly forwarded to the Home Office with a letter of transmittal (Form 130) and the renewal receipt, when, if approved, the corresponding Form 72½ will be issued and must be countersigned by the agent and delivered to the insured. The renewal receipt will also be returned to be held by the agent. Special extension of this Form will not be allowed on quarterly payments.

1. Any additional partial cash payments made before a note matures should be endorsed on the back of the note, and the company notified on Form 321.

NOTE 1.—It should be observed that the note Form 71½ is so worded that the company is not bound to any renewal or extension of the insurance until the note is approved and 72½ issued and signed by an officer of the company.

NOTE 2.—Agents should take notice that no Form 71½ will be approved unless it is actually executed on or before the day when the previous extension expires or the policy lapses. Policy holders who have taken extensions on any form should be notified of the fact some time before their notes mature.

NOTE 3.—When the days of grace allowed for the payment of a renewal premium expire, or a note on Form 71 or 71½ matures on a Sunday or legal holiday, payment may be accepted on the next succeeding business day but not thereafter.

[fol. 96] j. Premiums on which extensions have been given need not be reported, and renewal receipts must not be delivered, until they are paid for in full. But all partial cash payments (whether on renewals or on first premiums) are to be paid to the company with each report, no commissions being charged for them. When the balance of any such premium is collected within the term allowed under the extension, the premium will be reported in full, and the agent will charge in his report, on form No. 270, the partial payment previously made thereunder. If in any instance an extension note

is not paid at maturity, the policy will lapse according to its terms and both the renewal receipt and the extension note should be returned to the Home Office. The Company will retain the partial cash payment, and no commission will be allowed thereon. (See Sec. 21-h.)

k. Agents are not permitted to give their own receipts for premiums or parts of premiums.

1. Agents must not countersign or deliver any renewal after the expiration of the thirty-one days from its date, nor until the premium is actually paid; but should a remittance mailed or forwarded by express on or before the day a premium or extension note falls due, or within the thirty-one days of grace, accompanied with the interest, reach the agent in due course of conveyance, he is authorized to countersign and deliver the receipts as of the day the premium was forwarded.

\* \* \* \* \*

#### Section 21. Collection of First Premiums.—

j. Whenever a cashier or other person responsible for a policy delivers it to another or removes it from the office, a proper receipt should be obtained or given in duplicate on form 367-a, the original to go with the policy and the carbon copy to be filed in the place where the policy was kept. For renewals, form 367-B is to be used in the same manner. When the policy or the renewals is returned, or when the premium represented by the receipt is paid, the receipt form must be returned to the signer with proper endorsement on the end as provided. These forms are to be used in place of old form 367, except in cases where a general agent sends several renewal [fol. 97] receipts at one time to a branch office or to a bank for collection, when the old form 367 may be used. These receipts alone will be considered a voucher by the Auditing Department for a policy or a renewal charged to a general agent by the Home Office, unless evidence is shown that they have been returned to the Home Office. (Note under this sub-section included in Exhibit 31.)

h. When possible, settlement should be obtained at the time of writing the application, and in every instance where the whole or any portion of the first premium is paid before the policy is issued (whether in cash or by note) or partly in cash and partly by note) form No. 257-A or 257-B must be executed in duplicate, the applicant retaining the original and the duplicate being forwarded with the application to the company. Form No. 257-a must be used where the whole premium is paid either in cash or by note or both, and the agent may if he chooses, state in the form how much is received in cash and how much in note; but the company will hold him responsible for the amount of the note as well as for the cash. Form No. 257-B must be used where only part of the premium is paid either in cash or by note or both. Advance payments must not be accepted without the use of one of these forms. Any cash thus accepted shall in no case be less than one fourth of the premium,



with a minimum of five dollars in case the first premium is less than \$20, and all cash payments must be included in the first report made after their receipt. All partial cash payments must be reported on Form 270 and no commissions will be allowed thereon. After a policy has been issued, if any portion of the premium has been paid and the remainder can not be collected the general agent must, as soon as he learns that no more can be obtained, and not later than the report rendered, next after the expiration of the sixty days limit, return the policy with form No. 113, also with surrender form No. 139 duly executed by the insured and all the beneficiaries.

(Copied from former statement of facts.)

[fol. 98]

EVIDENCE: EXHIBIT No. 38

Introduction, by defendant, of Exhibit No. 38, being Form No. 71-A, and is copied from the statement of facts on the former trial of this case as follows:

Form No. 71-A

Must be signed by same person who signs the note Form No. 71.  
 Net Premium, \$—. Cash Pay't (If any) \$—. Balance, \$—. Interest Added, \$—. Amount of Note, \$—. Number of Policy, —, —, 191-. Premium fell due —, —, 191-. Note Matures —, —, 191-. I have this day, —, —, 191-, signed note as described herein.  
 x (Sign here) —, —, Insured, Beneficiary. Attest:  
 —, General Agent.

Form No. 71, Edition Jan. 1916.

Important.—This note must be signed on or before the days of grace expire.

Interest is added to the face of the Note.

\$—.

—, 191-.

On or before — after date, without grace, for value received, I promise to pay to the order of —, Agent of the Aetna Life Insurance Company, of Hartford, Conn., — Dollars, at his office in —, for premium due — under contract No. —.

This note, with a cash payment of \$—, being given to extend time for settlement of said Renewal Premium, it is understood and agreed that if the Note is not paid when due said contract shall then cease and determine, except for the non-forfeiting provisions (if any) to which this contract was entitled when the premium for which this note was given fell due; and it is also understood and agreed that this note will not be accepted by said company if written to mature at a date later than 60 days from the day when said premium fell due.

x —, Insured or Beneficiary.

x Must be signed on both lines marked x.

[fol. 99]

## EVIDENCE: EXHIBIT No. 39

Introduction, by defendant, of Exhibit No. 39, being an excerpt from the contract, same being shown as Form No. 72, and was copied from the statement of facts on a former trial of this case as follows:

## Form No. 72

This form must be filled out by the Agent and given to the Insured.

Aetna Life Insurance Company of Hartford, Conn.

— —, 191-.

A note for — Dollars due on the x— day of x—, 191-, without grace, having been given to extend the time for payment of premium under Contract No. —, issued by the Aetna Life Insurance Company, the insurance under said Contract is hereby continued until said Note becomes due, but no longer, and on payment of said note at or before the time it becomes due the regular renewal receipt of the Aetna Life Insurance Company will be delivered, at which time will also be returned the note, which contains the following condition:

"This Note with a cash payment of \$—, being given to extend time for settlement of said Renewal Premium, it is understood and agreed that if the Note is not paid when due, said contract shall then cease and determine, except for the non-forfeiting provisions, (if any) to which this Contract was entitled when the premium for which this note was given fell due; and it is also understood and agreed that this note will not be accepted by said company if written to mature at a date later than 60 days from the day when the said premium fell due."

This certificate is not binding unless countersigned by the agent of said company.

C. E. Gilbert, Secretary. — —, Agent.

Important.—Be sure to give attention on or before this date.

[fol. 100]

## EVIDENCE: EXHIBIT No. 40

Introduction, by defendant, of Exhibit No. 40, being an excerpt from contract between Aetna Life Insurance Company and Lyle I. Burbank and Harman Bartlett Alexander, date November 17, 1903, copied from statement of facts on former trial of this case as follows:

"That in consideration of agreements hereinafter made by the parties of the second part they are hereby appointed by said party of the first part its General Agents for the territory designated below—

to procure application for life insurance for said party of the first part in said territory, to receive premiums and deposits upon all policies and Gold Bond Contracts issued upon such application, and to collect premiums and deposit renewals of the same.

"Said parties of the second part further agree that they will be responsible to the said party of the first part for the premium and deposits upon all policies, Gold Bond Contracts and Renewal Receipts sent to them by the party of the first part, and for all interest collected by them on premium notes and policy loans; and that they will account to said party of the first part on or before the tenth day of each month or at any other time when required, for all premiums, deposits and interest received by them or their agents, remitting to said party of the first part the amount of same less such charges as they may be entitled to under this contract.

"Said parties of the second part further agree that the agency books, records and papers shall be kept in the manner prescribed by, and that they shall be the property of, said party of the first part, subject to its inspection and control at any and all times; and, that the business shall be conducted in all respects in accordance with the instructions of the said party of the first part.

"It is further understood and agreed that the Cashier at said agency shall be the cashier of said party of the first part; and that his appointment shall be subject to the approval of, and that he shall at all times be under the control and direction of, said party of the first part, and, that said cashier shall have charge of the collection of all moneys due said party of the first part in connection with the business of said agency, and that he shall be required to countersign [fol. 101] all checks for the disbursement of agency funds." Copied from Statement of Facts.)

#### EVIDENCE: EXHIBIT No. 41

Introduction, by defendant, of Exhibit No. 41, being a copy of letter attached to the deposition of H. B. Alexander, from William J. Moroney, Dallas, Texas, to said Alexander, of date January 2, 1919, as follows:

William J. Moroney

Dallas, Texas

January 2, 1919.

Mr. H. B. Alexander, Manager,  
Nashville, Tennessee.

DEAR SIR:

In *Dunken v. Aetna Life Insurance Company*, pending at Waco, I enclose papers to take your deposition as follows:

1. Direct and cross-interrogatories, with waiver of commission, etc.
2. Printed form of instructions to Notary.

3. Envelope in which to return deposition, all blanks to be carefully filled.

Please select a thoroughly competent and experienced notary, and see to it, if you are able to do so, that clear direct and complete answers are given to all questions. If for any reason you are unable to answer any of said questions fully, state why you can not do so.

Since I prepared the direct interrogatories, it has occurred to me that all or nearly all the papers referred to were turned over by you at the former trial. I have not gone through my files to learn what papers I have. If you are unable to attach the original or copies of any papers you should state in your answers why you can not do so.

Please pay the notary fee. The notary should attach to his certificate a receipt showing that this fee was paid by defendant.

Please mail me a carbon copy of your answers to the interrogatories for my files, and complete the deposition as promptly as practicable consistent with due care.

As you are required to return this original letter with deposition [fol. 102] I enclose a carbon copy for your files.

Yours very truly, W. J. Moroney. Encl.

(Copied from statement of facts, former trial.)

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#### EVIDENCE: EXHIBIT No. 42

Introduction, by defendant, of Exhibit No. 42, being a copy of Form No. 378, copied as follows from statement of facts on former trial of this case:

Form 378.

Ed. of May, 1907.

For use when a portion of a loan is to be applied towards payment of a premium.

Dated — — —, 191—.

The Aetna Insurance Company of Hartford, Conn., is hereby directed and authorized to deduct part of the premium due on account of change of plan and the Jan. 28, 1916, premium on Contract No. 152775 issued by said Company, from the proceeds of a loan of \$150 applied for by the undersigned under said contract.

It is hereby agreed that the part of said premiums shall not be considered as paid, nor the said Company bound thereby until the Home Office has granted the loan above mentioned and issued a check for the excess, if any.

Sign here: — — —.

## EVIDENCE: EXHIBIT No. 43

Introduction, by defendant, of Exhibit No. 43, being a copy of Form No. 547, copied from statement of facts on former trial of this case as follows:

Form No. 547.

For Pols. issued sub. to 6-1-07 except Paid-ups.

*Loan Agreement*

\$1,050.

Policy No. 152,775.

For value received, I promise to pay to the Aetna Life Insurance Company of Hartford, Connecticut, the sum of One Thousand and Fifty Dollars with interest at the rate of six per cent per annum payable annually in advance (the first year's interest to be deducted from the amount received hereon) and I acknowledge the amount of this note, with any interest that may accrue to be an indebtedness to said [fol. 103] Aetna Life Insurance Company on account of Policy No. 152775 issued by said Company on the life of Wiley J. Dunken which policy with all right, title and interest therein, and all benefits to be derived therefrom, is hereby pledged to said company as security for the payment of said indebtedness.

I hereby agree that when any interest on this note becomes due and is not paid, the same shall be added to and become a part of the principal indebtedness evidenced by this note and subject to the same rate of interest.

I further agree that all payments hereon, whether of principal or interest, shall be made at the Home Office of the Company in Hartford, Connecticut, or to an agent whose authority for receiving the same shall be the possession of this note or a receipt signed by an executive officer of said Company.

I hereby certify that I am the owner of said policy duly authorized to pledge the same as security for this note, and I also certify that said policy has never been assigned or transferred to any person or party.

I further certify that I am — now adjudged insolvent nor have I made a general assignment for the benefit of creditors that remains unsatisfied.

Witness my hand and seal at —, State of —, this — day of —, 191—.

Sign here: — [L. S.] — [L. S.] —  
 [L. S.] Witnesses: See below: Name, —;  
 Address, —.

NOTICE.—Each signature on this form should have two witnesses whose addresses must be given.



## EVIDENCE: EXHIBIT No. 44

Introduction, by defendant, of Exhibit No. 44, being a copy of Premium Receipt, Form No. 1261½, copied from the statement of facts in the former trial of this case as follows:

Form No. 1261½.

Ed. Aug., 1910.

[fol. 104] The Aetna Life Insurance Company hereby acknowledges having received payment on Contract No. S-152775 on the life of Wiley J. Dunken continuing said contract in force five years from this date, to the 28th day of January, 1916.

J. L. English, V. P.

Across the face of the above is the following:

"Credited by H. G. Chase, May 10, 1916."

The back has the same notice as that copied in Exhibit No. 6.

## EVIDENCE: EXHIBIT No. 45

Introduction, by defendant, of Exhibit No. 45, being another premium receipt, and is copied from statement of facts on former trial as follows:

Exd. F. E. McK.

Morgan G. Bulkeley, Prest.

Hartford, Conn., January 28, 1916.

The Aetna Life Insurance Company hereby acknowledges the receipt of the payment due on above date under Contract No. s-152,775 on the life of Wiley J. Dunken. Age, —; Amt., —; Kind, —; Payts., —, in accordance with this statement.

Not binding without date of payment and signature of agent here.  
Payment due, \$277.70

1.39

Paid this — day of —, 19—.

— —, Agent at Nashville. No. of payts. —

(See notice to contract holder on the back of this receipt.)

G. E. Gilbert, Secretary.

(On the back of the receipt in this credit:)

"Credited April 28th, 1916.

H. C. Chase

(The back has the same notice as that copied under Exhibit No. 6.)

[fol. 105]

## EVIDENCE: EXHIBIT No. 46

Introduction, by defendant, of Exhibit No. 46, being a telegram from from W. J. Moroney to F. W. Bidwell, care of Aetna Life Insurance Company, Hartford, Conn., copied from statement of facts on former trial of this case as follows:

*Day Letter*

The Western Union Telegraph Company, Incorporated. Form 2589 A. 25,000 Offices in America. Cable Service to all the World. Theo. N. Vail, President. Belviders Brooks, General Mgr. Receiver's No. —. Time filed, —. Check.

Send the following Day Letter subject to the terms on the back hereof which are hereby agreed to.

January 13, 1917.

F. W. Bidwell,  
Care Aetna Life Insurance Co.,  
Hartford, Conn.:

Your letter of 9th received. Dunken case set specially for twenty-second. I desire your presence. Meet me in Dallas not later than twentieth. Bring all original contracts with Alexander and Burbank & Alexander, also all general and special instructions showing their authority and all correspondence and other papers about any Dunken policies from beginning. I have also asked Alexander to come. Am writing.

W. J. Moroney.

## EVIDENCE: EXHIBIT No. 47

Introduction, by defendant, of Exhibit No. 47, being a letter from W. J. Moroney, dated January 13, 1917, to H. B. Alexander, Nashville, Tenn., and is copied from statement of facts on the former trial of this case as follows:

January 13, 1917.

Mr. H. B. Alexander, Manager,  
824 Stahlman Building,  
Nashville, Tenn.

DEAR SIR:

I have your favor of the 11th instant. I also expect Mr. Bidwell to be present at the trial.

Please bring with you all original contracts between the Company and yourself and the firm of Burbank & Alexander; also all general [fol. 106] and special instructions showing your authority and all correspondence and other papers about any Dunken policies, either with Dunken or with the Company or with anybody else, from the beginning.

Please also have with you the official publication containing the Tennessee statute on the subject of life insurance penalties, attorneys' fees, of which you sent me a copy some time ago.

Please report to me promptly when you reach Dallas, and oblige,  
Very truly yours, W. J. Moroney. WJM. r.

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EVIDENCE: EXHIBIT No. 48

Introduction, by defendant, of the following extract from letter of Mr. Newell to Howard E. Wright, dated May 1, 1916, copied from the statement of facts on former trial as follows:

"Referring to Vice-President English's letter of February 28th in which Mr. Alexander was instructed to report the increase premiums under No. 152,775-Dunken in his March 31st report, if he has been unable to make collection this policy with the renewal receipts should be returned for credit. Mr. Daughn has just called my attention to the fact that the 1916 renewal receipt under this number has been returned for credit and we can not understand why Mr. Alexander has not returned the policy and blanket receipt covering yours 1912 to 1915 inclusive. Please investigate and make full report."

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EVIDENCE: EXHIBIT No. 49

Introduction, by defendant, of the following excerpt from a letter dated at Nashville, Tenn., 5/4/16, addressed to Mr. W. H. Newell, Assistant Secretary, signed by Howard E. Wright, same being copied from the statement of facts on the former trial of this case as follows:

"Referring to your letter of May 1st addressed to the writer concerning #152,775-Dunken, I have taken this matter up with Mr. Alexander personally and find the blanket receipt covering the years 1912 to 1915 inclusive at this office, which we are returning with the other items for credit. The policy together with the loan papers,  
Waco

was sent to Mr. Dunken at Dallas (By agreement of counsel for plaintiff and defendant Waco was to be used instead of Dallas) [fol. 107] Texas by Mr. Alexander and the matter is now in correspondence, although the insured has failed to answer the recent letters from this office. It may be that I will go to Dallas (Waco) within the next ten days, and have agreed with Mr. Alexander to see Mr. Dunken and complete the necessary."

## EVIDENCE: EXHIBIT No. 50

Introduction, by defendant, of Exhibit No. 50, being a letter dated May 11, 1916, from W. H. Newell, Assistant Secretary, to Howard E. Wright, Nashville, Tenn., copied from statement of facts on former trial as follows:

Aetna Insurance Company, Hartford, Conn.

Morgan G. Bulkeley, President; C. E. Gilbert, Secretary; W. H. Newell, Ass't Secretary

May 11, 1916.

Howard E. Wright,  
c/o H. B. Alexander, Manager.

DEAR SIR:

Referring to your favors of May 4th and 6th, the Nashville report dated April 29th has been examined and we send you herewith carbon copy of our letter to Mr. Alexander.

Referring to your explanation regarding the Dunken policy No. 152775, I understand that you expect to be in Dallas next week and I hope then you will be able to return the policy. The insurance has lapsed and before anything can be done it will be necessary for Mr. Dunken to submit an application for revival.

You refer to a number of items "Where there was apparently a discrepancy between the company's records and those of the Agency" we find no memorandum on the old in-hand list and presume you located the errors on the Nashville records. If not, we will be glad to be advised.

Yours truly, W. H. Newell, Asst. Secy. WHN-S. Encl.

*Agreement*

It is agreed, by and between counsel for plaintiff and defendant that the word "Waco" is to be used in the foregoing letter, Exhibit No. 50, instead of the word "Dallas".

[fol. 108]

## EVIDENCE: EXHIBIT No. 51

Introduction, by defendant, of Exhibit No. 51, being an extract from office copy of purported letter of W. H. Newell, Assistant secretary of Defendant, dated Hartford, Connecticut, May 11, 1916, to H. B. Alexander, Manager, copied from statement of facts on former trial as follows:

"Referring to Mr. Wright's explanation regarding policy No. 152,775—Dunken, we have received the blanket receipt covering premiums for the years 1912 and 1915 inclusive. It appears that this policy on the 20 payment Commercial Life plan was issued in

exchange for Convertible Term Policy 98322, and in view of the fact that you have been unable to make collection the policy (152,775) should also be returned."

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EVIDENCE: EXHIBIT No. 52

Introduction, by defendant, of Exhibit No. 52, being an agreement entered into between attorneys in this case, copied from the statement of facts on the former trial of this case as follows:

IN THE NINETEENTH JUDICIAL DISTRICT COURT, MCLENNAN  
COUNTY, TEXAS

[Title omitted]

For the purpose of expediting the trial of the above entitled and numbered cause, and to avoid unnecessary trouble and expenses, the parties hereby agree as follows:

1. On the trial either party may introduce in evidence any original paper or copy offered in evidence on the former trial, as shown by the record, without proof of execution, and without accounting for the absence of originals, but the introduction of any such paper or papers shall be subject to all other legal objections that may be made.

2. The oral testimony of witnesses who testified at the former trial, as shown by the official stenographer's report, except the testimony of the witness Alexander, of Nashville, Tenn., may be read in evidence without producing the witnesses or taking depositions, but any such oral testimony shall be subject to all other legal objections that may be made.

3. This agreement is without prejudice to the right of either party [fol.109] to offer any additional evidence not herein provided for, subject to all legal objections that may be made to any such evidence.

J. A. Stanford, W. E. Spell, Attorneys for Plaintiff. W. J. Moroney, Attorney for Defendant.

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EVIDENCE: EXHIBIT No. 53

Introduction, by defendant, of Exhibit No. 53, being a letter from Nashville, Tenn., signed by Howard E. Wright, addressed to Mr. W. H. Newell, Asst. Secy. dated 5/4/16, copied from the former statement of facts as follows:



Aetna Life Insurance Company of Hartford, Conn.

Morgan G. Bulkeley, President

Nashville, Tenn., 5/4/16.

Mr. W. H. Newell, Aast. Secy.

DEAR SIR:

Re-report

We are mailing under separate cover the final report covering April collections.

Additional sixty days' time has been granted provided proper health certificate is furnished, under the following numbers:

#469,726	Buchanan.
150,270	Jackson.
150,345	Rather.
150,346	Rather.
151,205	Turner.

I enclose herewith forms #113 under Nos.

470,383	Burch.
149,674	Cheely.

Mr. C. A. Clutts, the agent at Clarksville, Tenn., has failed to make remittance covering the following premiums which we intended to include in this report. This agency is experiencing considerable difficulty making collections from this agent, although we have written and wired him demanding payment but have been unable to collect settlement, although he promises to let us have remittance at once. We will make every effort to close this proposition by next report.

[fol. 110]	#150,699	Dickson.
	152,529	Mullins.
	154,523	Richardson.
	154,567	Adams.

Agent G. B. McClure, of Chattanooga, failed to include in his last remittance one premium #470,535—May, and stated that he would make settlement for this item with his next remittance.

Regarding #151,497—Hughes, the agent who wrote this business is out of town, and we will be obliged to defer accounting for this item until our next report as we have no information regarding same.

Referring to your letter of May 1st addressed to the writer concerning #152,775—Dunken, I have taken this matter up with Mr. Alexander personally and find the blanket receipt covering the years 1912 to 1915 inclusive in this office, which we are returning with the other items for credit. The policy together with the loan papers,

was sent to Mr. Dunken at Dallas (Waco) Texas by Mr. Alexander and the matter is now in correspondence, although the insured has failed to answer the recent letters from this office. It may be that I will go to Dallas within the next ten days, and have agreed with Mr. Alexander to see Mr. Dunken and complete the necessary —.

The following policies appear to have been delivered within the company's limit:

#149,132 Kenny.  
151,392 Hardin.  
151,493 Sawyers.

The following renewal premiums mentioned in your letter of May 1st are being reported, and our reason for not returning them to the Home Office before is that they were items involved in the recent disturbance at this Agency, and were, therefore, handled somewhat differently from the regular instructions of the company:

#381,801 Hartman.  
381,802 Hartman.

#129,151—Howard is also another item which would be covered under the same explanation. We are endeavoring to effect a collection covering balance of this premium.

Replying to your inquiry contained in form letter covering report errors, beg to advise that the first commission will be charged under 139,806 in the report of May 15th. All other differences contained [fol. 111] in that statement are corrected in this report.

Referring to your statement that the January premium is not accepted under lapsed policy #119,698—White, we advised Mr. Bidwell, who handled this matter, to furnish the company satisfactory information while he was in Hartford, which we presume has been done.

We are in receipt of form #972 advising that the medical examination under Robert E. L. Wilson was made contrary to the Company's rules and that the amount of \$5 should be included in our report. I have referred this matter to Mr. Alexander who stated that same should be held in abeyance.

Please note a deposit amounting to forty cents listed on Reports Recapitulation. This I believe covers an error which occurred in the last report.

The date of payment covering a considerable number of items embraced in this report may not appear to have been made within the company's time, and since my return to Nashville, I have devoted the greater portion of my time endeavoring to effect collections on first premiums, therefore at this writing I can not state the conditions with reference to renewal premiums.

The first paragraph of your favor of May 1st states that you do not understand why it is not practical to rule out the list returned by you. Realizing that it required considerable labor to produce a new list, I think it necessary to give a clear explanation of the matter. The responsibility of checking off this inband list was dele-

gated to a stenographer in this office by Mr. Bidwell. She had not been properly instructed, therefore, I deem it necessary to check this inhand list carefully, and since it had been previously checked it was not practical to furnish the company with a double checked inhand list, which, to say the least, outside of appearances would be a cumbersome statement for the Home Office to handle.

Referring to all questions in reference to the outstanding items at this agency, I beg to state that under the circumstances it is not certain that all items are properly account- for to date.

[fol. 112] Yours very truly, Howard E. Wright. H. E. W./C.

### Deposition of H. B. Alexander, Offered by Defendant

Introduction, by defendant, of the Deposition of the witness H. B. ALEXANDER, who testified as follows in answer to direct interrogatories propounded by defendant's counsel, W. J. Moroney, Esq.:

My name is H. B. Alexander, my residence is Nashville, Tennessee, and my occupation is that of State Manager of the Aetna Life Insurance Company for the Life Department of the State of Tennessee. I have been connected with that company in that capacity since 1905. I personally knew Wiley J. Dunken in his life time. I first met him in December, 1910. I only knew him in a business way. I solicited him for life insurance and sold him two policies in the Aetna Life Insurance Company. He resided in Nashville when I knew him personally. Yes, he left his former residence about two years after I first knew him, and went to Texas. I had some correspondence with him relative to his life insurance after he left his former home. I had no communication with Mr. Dunken other than correspondence after he left Nashville. As stated above, I personally represented the Aetna Life Insurance Company in soliciting the policies involved in this suit, and in subsequent transactions with Mr. Dunken. I did have correspondence with Mr. Dunken about the life insurance involved in this litigation, but all of the correspondence that I had copies of was turned over, as I recall it, to the court on the first trial of this case, at Waco, Texas. I have furnished the original or copies of all the correspondence that I had. There were a number of notices sent to Mr. Dunken in regard to the payment of his premiums, and perhaps some letters that were written by me in person that I made no copies of. All of the correspondence that I had, as stated above, was furnished to the court, and I have none in my possession at present at any time.

I am familiar with the contracts between myself and the firm of Burbank & Alexander and the defendant company, together with the defendant's book of Rules. The defendant company never conferred upon me any general or special authority with reference to Mr. Dunken's insurance, except as shown by said contracts, book of rules, and correspondence with defendant company that were offered in evidence on the former trial of this case.

There have been no premiums or any part of premiums paid on the policies involved in this suit.

7. Referring to your letter to Mr. Dunken dated March 4, 1916, were the enclosures mentioned in said letter actually enclosed? Did you ever receive any answer to said letter? Did Mr. Dunken ever pay or offer to pay in whole or in part any of the sums mentioned in said letter? Did Mr. Dunken ever return to you any of the instruments mentioned in said letter? Did you write or telegraph to Mr. Alexander after writing said letter of March 4, 1916? If not, please state any reason within your knowledge why communications between yourself and Mr. Dunken ceased?

A. I have every reason to believe the enclosures were actually enclosed with my letter of March 4th, 1916. They were sent out by the cashier of the Company's Agency at Nashville under my direction. I did not receive any answer whatever to said letter, nor did Mr. Dunken ever pay or offer to pay, in whole or in part, any of the sums mentioned in said letter, and he did not return to me any instruments mentioned in said letter. I do not remember having written any personal letter to Mr. Dunken after March 4th, 1916, but I constantly reminded my office force in regard to the necessity of Mr. Dunken taking action immediately, and most of such notices were usually sent out on printed forms, and no copies kept, but I can't say positively in this case as to what notices or communications were sent to Mr. Dunken, but there were some changes of importance being made in my office at that time which caused quite a disturbance of our office force and work. I never, at any time, granted to Mr. Dunken any extension of time for the payment of premiums except by the Company's regular extension form notes, containing the original or lithographed signature of an executive officer of defendant company, or without a note in form pre-[fol. 114] scribed by defendant company, and signed by Mr. Dunken. I never deviated from this practice at any time. Mr. Dunken never, to my knowledge, signed any instrument whatever under the policy in question. He only signed an extension form to extend the premium for sixty days under the term policy No. 98322, which policy was converted to No. 152,775, but no forms whatever were signed directly pertaining to Policy No. 152,775, the policy in question. I do not recall ever having signed Mr. Dunken's name to any instrument, and no executive officer of the defendant ever authorized or directed me to do so. I never received any instructions from the company in regard to signing Mr. Dunken's name to any papers whatever. The company has always given me definite instructions not to sign the extension forms for any policy holder unless I had power of attorney to do so.

Prior to the institution of this suit, I furnished to Forrester & Stanford, attorneys for plaintiff, all the correspondence that I had, so far as I recall it, pertaining to this case.

I testified in person on the former trial of this case at Waco, Texas, and I produced all correspondence and other papers that I had at my command referring in any way to Mr. Dunken's insur-

ance policies, and so far as I know all such papers were submitted to plaintiff's attorneys for examination. I do not recall the nature of the receipt which, you state (In Interrogatory) was stamped "Credited" in the name of H. C. Chase. You perhaps refer to the blanket receipt sent out by the Company, which covered certain numbers of years of premiums, and so, that receipt was mailed to Mr. Dunken, expecting him to execute certain loan papers and make certain cash payments which would entitle him to become the holder of said receipt or receipts. If such a receipt was sent out, as above stated, it was sent from the home office of the company to me and I mailed it to him.

(At this juncture, court adjourned until 2.00 p. m.)

[fol. 115]

Afternoon Session, May 31, 1921

Introduction, by defendant, of the following testimony of the witness H. B. ALEXANDER, contained in the deposition of said witness:

In answer to cross-interrogatories propounded by attorneys for plaintiff: I am the General Manager of the Aetna Life Insurance Company in the state of Tennessee, and was a member of the firm of Burbank & Alexander when the Dunken Policy was issued in 1911, and have been in that capacity before and since that date. It is also true that I took the original application for the insurance from Mr. Dunken, and delivered to him the original policy, and either I, or my cashier, or office force, have attended to all matters pertaining to said policy up to the time of Mr. Dunken's death, but the matters of collecting premiums and looking after policies in general, after a policy is first issued, is practically all done by the clerical office force in my office.

As General Manager, I have, I believe, at this time, and have had in the past, one or two district agents under me, who are required to make reports to me, but not monthly reports; they are not required to make reports to me at any definite period, any more than that of any local agent, for all the money that they ever handle is for first year's premiums on new policies, and often times an agent has no new business to report that month, therefore no report is required.

It is true that the company, in making the first extension of a premium, furnished me, and I was required to use three forms, Nos. 71, 71-A and 72. Form 71 is a blank form of note, but not a negotiable note, to be signed by the assured and held by me. Form 71-A is a memorandum form stating the amount of the premium, if any cash payment thereon was paid, the number of the policy, and other information necessary to the company to know that form 71 had been properly signed, but form 72 is not a receipt for such note, signed by me, but it is a form of agreement stating the conditions under which form 71 was granted; but these forms were never used in direct connection with policy No. 152,775, but only used in the extension of the premium of the term policy No. 98322.



It is true that when I took the extension note for \$106.45, dated [fol. 116] February 26th, 1916, on Form No. 71, that I filled out Form No. 71-A and sent it to the Home Office, as the rules of the Company required me to do.

It is true that I was required to make monthly reports to the Home Office at the last of each month, and also that at that time I was required to make semi-monthly reports, which were made on or about the 15th and 30th of each month. I made a report to the Home Office for the months of March, April and May, 1916, and I have copies of such reports, and my report of the 29th day of February 1916, shows that I returned to the company the renewal receipt under the Dunken policy No. 98322, and I herewith attach a copy of said report pertaining thereof, and file it as Exhibit No. 1 to this my deposition (which said exhibit has already been offered in evidence in this case, being Exhibit No. —).

Yes, W. J. Dunken was notified that his note for \$106.45 dated February 26th, 1916, was due, as stated in the note, and as to what correspondence was had directly on this will be shown by the letters and correspondence as filed with the court in this case, provided I kept copies of such correspondence, but as above stated, most of the notices of extension notes and premiums were sent out on printed forms of which no copies were kept.

I think it is true that I had in my possession at the Nashville agency the note for \$106.45, dated February 26th, 1916, at the time of Mr. Dunken's death, for these forms are not negotiable paper, and they so state on their face that if they are not paid when due, that said contract shall then cease and determine, except for the nonforfeiting provisions, if any, to which this contract was entitled when the premium for which this note was given fell due, and I was not accustomed to return such notes when the insured did not pay them for there was no obligation binding further. I cannot say that I asked Mr. Dunken directly to pay this note, for it was to be absorbed in the payment of the back premiums to which I have referred, for he signed the extension note only to keep the policy in force until he would complete the papers and payments necessary [fol. 117] under the conversion of the new policy.

Yes, I wrote Mr. Dunken on March 4th, 1916, enclosing him the new policy, No. 152775, as stated in my letter, and I presume all the conditions to the delivery of said letter are stated in said letter, of which I have no copy, as same was furnished to the court and is now on file there. It is not true that I did not ask Mr. Dunken to return policy No. 152775, for I plainly stated to him in my letter of March 4th, 1916, that certain loan papers were necessary to be signed and certain cash payment was to be made, and that the policy was to be returned to me. I do not remember when I last saw Mr. Dunken, but I think it was about two or three years after the term policy No. 98322 was issued.

I conducted all of the negotiations and correspondence with Mr. Dunken, either in person or through my office, regarding the conversion of his term policy No. 98322 into his Commercial Pay Policy No. 152775. I have not the correspondence before me for

reasons stated in the foregoing answers, but I presume that this correspondence and negotiations began on or about January 29th, 1916, and I am not prepared to say whether my negotiations and correspondence were closed by my letter of March 4th, 1916, or not, but that is the last letter of which I had a copy. I had authority from the company to conduct such negotiations and correspondence, and to do all that I did, except my instructions from the company were when I was sending out a policy simply for inspection, as I did Policy No. 152775, to use Receipt Form No. 359, which I file herewith as Exhibit No. 2 to this my deposition (said exhibit being already in evidence in this case, and shown under Exhibit No. 37), which receipt would show that the policy was sent for the purpose of examination only, but inasmuch as my letter directed Mr. Dunken to return the policy with the papers and payment, as requested in my letter of March 4th, 1916, I thought it not necessary to send out said Form No. 359, for I deemed it not necessary for any delay in the examination of the policy. I do not find copy of any letter where I notified Mr. Dunken that the negotiations for the conversion of said policy were off, for it is shown by my correspondence, which I think [fol. 118] was filed with the court, that he thoroughly understood the requirements and knew very well that he had not met with these requirements, and it was not necessary to notify him that our negotiations were off.

You state in your interrogatory that in a letter dated February 28, 1916, at Hartford, Conn., written by J. L. English, vice president of the company, in which he enclosed to me the new policy, and also enclosed certain loan papers, Mr. English knew or the Home Office knew, that Mr. Dunken desired a loan on the new policy, for I am sure that I notified him to this extent, and that is the reason why he enclosed the loan papers. I think it is true that when I sent the term policy to the Home Office to be converted that I, at that time, asked that loan papers be sent out under the new policy, so that Mr. Dunken would not have to pay in cash the full amount of the premium, but the loan papers were not sufficient to cover that year's premium and all of the back premiums that he had proposed to pay in order to date his policy concurrent with the date of term policy No. 98322, for I had known for some time by his correspondence just how hard run he was on financial matters, and I was making an effort to have the company loan him the largest amount possible.

The amount of the annual premium on policy No. 152775, dated January 21st, 1911, would have been, if I correctly understand the policy to which the conversion was made, \$277.80, that would have been the 1916 premium, from January 28th, 1916, to January 28th 1917, but Dunken, the insured, was not entitled to that rate until he had paid all the back premiums which was the difference between the term rate of \$105.40, annual premium, and said rate just quoted, and as above stated, no part of the 1916 premium or any part of the difference between the term premium and the whole life premium under policy No. 152775 were ever paid, or no papers or forms whatsoever signed to complete this transaction.

[fol. 119] Yes, it is true that the cashier in my office is appointed by the Home Office, and is under the direction and control of said office. It is also true that the books in my office are furnished by the Home Office and are kept, to the best of our ability, as required by the Home Office, and that all such books, papers, and documents are open to the Home Office at all times.

It is a fact that part of my duties as Manager, were to deliver, or supervise the delivery, of all policies, and the period of time over which this has extended has been since I became Manager of the Company.

Yes, I did request W. J. Dunken to make payment, not only of the first premium on policy No. 152775, but on the subsequent premiums which were required under the conversion of this policy. This was done by letter, if I recall the date, of March 4th, 1916, which is now in the hands of the court in this case.

I have not received any letter or communication telling me how to answer these interrogatories. I have a letter from Mr. Wm. J. Maroney atty. of Dallas, Texas, which I attach hereto, and which will speak for itself as to its contents (which letter is already in evidence, and is shown under Exhibit No. —).

Introduction, by defendant, of the testimony of the witness W. J. MORONEY, copied from the statement of facts on a former trial of this case, as follows:

I wish to state that I have carefully gone through the entire instrument referred to commonly as the book of rules, and entitled "instruction book No. 7," in the book itself, and I find nothing in this instrument bearing on the authority of agents, except what I have read to the jury, and what had been previously introduced by the plaintiff.

Introduction, by defendant, of the testimony of the witness FRANK W. BIDWELL, copied from the statement of facts on a former trial of this case, as follows:

[fol. 120] Direct examination.

By Mr. Moroney:

My name is F. W. Bidwell. I reside at Hartford, Connecticut. My business is life insurance with the Aetna Life Insurance Company. I have been connected with the Aetna Life Insurance Company thirty-seven years last August. My position with the Aetna Life Insurance Company is Supervisor of the Claims Department.

I am not, nor have ever been, President. I am not, nor have ever been, Vice-President. I am not, and have never been one of the officers, President, Secretary, and so forth, named in this clause of the policy which reads as follows: "All agreements made by the company are signed by its president, vice-president, secretary, assistant secretary, treasurer or assistant treasurer. Nor other person can alter or waive any of the conditions of this policy or make any agreement which shall be binding upon the company."

My duties as Supervisor of the Claim Department, I have charge of all the claims, annuities, supplementary contracts and anything pertaining thereto. I look up, and have looked up, by my men, or my department, the premiums, all kinds of additions to the policies and deductions from the policies, whether the premiums have been properly paid or not. That is a part of my duties and various other things, which it would take some time to enumerate, but which I am willing to do to the best of my ability if you wish a further answer. I have held that position about twenty-five years. I am acquainted with Mr. Alexander. I received such a telegram from you (Mr. Moroney) which was read in evidence yesterday, in which I was requested to bring with me certain papers and documents, and so forth, including everything about all these Dunken policies we had. I received that telegram before I left Hartford. (This Exhibit is shown under Exhibit No. 46, of this Statement of Facts.)

When I received that telegram (Exhibit No. 46), I had them search our records. I made a further search of our records to see if I could find anything else which I had not already sent to our attorney. I found two or three papers which had been overlooked before, and these I brought with me. I made a complete search of the records of [fol. 121] the Home Office of the company, with reference to these Dunken policies, anything there that referred to them.

The book which is now handed me is the instruction book; that is form 154, instructions, Aetna Life Insurance Company. It is a book given to our agents, called and designated as our instruction book, containing the rules and regulations of the company under which authority our agents are instructed to act.

#### Examination by Mr. Stanford:

I did not furnish Mr. Alexander with a copy of those rules. I did not see a copy furnished him. I told him I did not know of my own knowledge.

#### Examination continued by Mr. Moroney:

I wish to add something to the statement I have made as to what I know of my own knowledge.

Mr. Howard D. Wright is one of the examiners for our auditing department. They are generally called auditors; they are examiners for the auditor. We only have one auditor for the company, and he employs these various examiners who go around to the various agencies, one of them is Mr. Wright. The examiner is Assistant to the Auditor; that is precisely it. I have some correspondence with Mr. Wright with me here.

(Witness is handed copy of letter of date May 1st, 1916, addressed to Howard E. Wright, Esq., care of H. B. Alexander, manager, not signed, but containing initials at the bottom W. H. N.:C.)

I found the paper I have in my hand in the original files of the Aetna Life Insurance Company. I can tell from the practice of the company what the initials at the bottom mean—"W. H. N." That

means the letter was signed by W. H. Newell, Assistant Secretary. It would indicate that he signed the original letter. It means it was signed by W. H. Newell, the Assistant Secretary of the Aetna Life Insurance Company. The other initials are the initials of the stenographer to whom the letter was dictated.

Have seen the letter before, which is now presented to me, and which is dated 5/4/16, addressed to Mr. W. H. Newell, Assistant Secretary, and purporting to be signed by Howard E. Wright. I got that [fol. 122] from the original files in the Aetna Life Insurance Company at Hartford. I know whether that is the genuine signature of Mr. Wright. I am acquainted with it. That is his genuine signature, and I found it in the regular files of the Dunken case.

I got from the original files of the Aetna Life Insurance Company, at Hartford, what purports to be a letter dated May 11th, 1916, addressed to Howard E. Wright, care of H. B. Alexander, Manager, not signed, but containing the initials "W. H. N. S." Those initials meaning the same here as they do in the other letter, that is, dictated by W. H. Newell and written by the stenographer, "S." W. H. Newell being the Assistant Secretary. The "S" stands for the stenographer's name. I got from the original files of the Aetna Life Insurance Company at Hartford what purports to be a copy of a letter dated May 11th, 1916, addressed to H. B. Alexander, Manager, not signed, but initialed "W. H. N.—S." I found it where I found those other papers I have just mentioned. That also indicates that the letter was dictated by Mr. Newell. The papers, which have been marked by the stenographer as exhibits (on former trials 26 and 29, and 40 and 43) 42 and 45 were found by me in the original files of the Aetna Life Insurance Company at Hartford, both of them. I did not see the two instruments stamped on the back there. I do know who did stamp them. I know what those stamp endorsements mean. The bookkeeper named H. D. Chase, might say I have known him since he was a boy, put his stamp on here to show that they were credited to our agent to whom it was first sent. They came back and were credited to the agent. Exhibit (original trial 28, second trial 42) 44, April 28, 1916, under Exhibit (original trial 29, second trial 43) 45. He is our regular bookkeeper. In that particular instance it was credited to H. B. Alexander. One is dated May 10th and the other April 28th.

I know where Mr. Howard E. Wright is supposed to be now. I know where he was sent, and I presume he is still there. He was sent to Kansas City, Missouri. He was sent there before I left Hartford, several days before I left. Mr. Howard E. Wright was not in Hartford when I received Mr. Moroney's telegram that has been read [fol. 123] in evidence. He had already left several days before for Kansas City, Missouri. The original letters, of which purported copies have been presented, were not in the archives or files of the company. I don't know where they are. The examiner don't keep them very long, I don't reckon, because they know we have copies in the Home Office when they get back. It is not usual for him to keep those letters. I have no reason to believe that the original letters are in existence.



As to where Howard E. Wright and Mr. Alexander were in May, 1916, they were addressed to our manager, as they always are, with our examiners and officers where their office is located. That would be Nashville, Tennessee, in this case. Mr. Wright was at Nashville at that time. He, Alexander, was supposed to be there also, I reckon. It made no difference about the receipt of the letters, they would have gone to the office and Mr. Wright would have gotten them.

(Offered by Defendant)

Cross-examination.

By Mr. Stanford:

The letter of May 1st is supposed to be a copy of a letter written by Mr. Newell, Assistant Secretary, to Mr. Wright, examiner for the auditing department. I don't consider that Mr. Wright was strictly an officer of the company. You asked me if he was an officer, I say he was not. At that time he was in the employ of the Aetna Life Insurance Company of Hartford, Connecticut. He is still in the employ of the company. I have made inquiry of Mr. Wright whether or not he has the original letter. I made that inquiry when he was home after the death occurred. I don't remember just the day, but it was soon after the death papers came in. I saw Mr. Wright then. It was soon after the death claim came in under the other ten thousand dollar policy which we paid when proof of death came in. The letter that is being discussed here does not mention the policy which was paid.

I testified a while ago that I received Judge Moroney's telegram a few days—he asked me to bring all the papers pertaining to the Dunken policy. I also testified that on receipt of that I went through [fol. 124] the files of the company and made other search. I had made one search already, and I went to the files and made another search. I found two or three additional papers. When I went through the papers before I found two or three additional papers, I mean my department. I got this batch of correspondence that Judge Moroney has here that he has been asking me about when I made this last search, although I had extracts of them before, but when I received the telegram to bring all papers, then I got the originals from our files and brought them with us. Then it was I found these here that are being offered in evidence.

I did not then wire Mr. Wright to know if he had found the original letters. I don't remember whether it was six months ago or not that he told me that. I know it was when he was at the home office. He has an office at Hartford, Connecticut, in the building of the company there. On receipt of Mr. Moroney's telegram I personally went to the files and got this letter out. The first search was made by my men. Mr. Wright hasn't a separate file where he keeps his correspondence that I am aware of. I don't think he has. He is not supposed to.

I asked Mr. Wright when he was at the Home Office directly after we received directions of death, under the other policy which we paid, I asked him if he had any of those letters. I told him we had extracts; I told him my department made extracts from the copies. I don't believe he made search to see whether he was, but simply that conversation. I had the copy there. I didn't consider it material whether I had the original or not. Our official copies. The letters that were sent to him would not have been a part of the archives of the records of the company at the Hartford Office.

#### *Agreement*

It is agreed that Exhibit No. 44 was credited to the agency on May 10th, 1916, and that Exhibit No. 45 was credited on April 28, 1916; that these exhibits were returned by the agency to the Home Office and at the time of their receipt by the Home Office they were [fol. 125] credited to the agency so returning them at that time.

#### *Agreement*

It is agreed that Wiley J. Dunken lived in Waco on May 4th, 1916, and that Howard E. Wright thought he lived in Dallas.

#### *Testimony of Witness Continued*

I am familiar with the rules in this book of rules; it is called the book of instructions.

Q. Mister Bidwell, this book of rules is dated June, 1915, state whether or not there was any changes, whether or not this book brings forward those rules, or whether or not there were any previous rules while—since 1911 or since then—were there any rules than what is in this book?

A. I was waiting to see if you had any objection before I answered. There has been changes more or less; the book which I—my own person books shows the changes made since that was issued; a few changes, but nothing that pertains to this question, so far as I know.

That book doesn't contain all the rules since 1911, because there are changes being made, some minor details. That is the rules with reference to the authority of agents. I have all that with me in my own personal book. I have that book here. This book is charged to me and I want to keep it, is all. The additional papers, when a change is made, the company notifies us, and they are pasted in the back of the book. Here are the changes from here on. This was not all changes, but they are simply reprints mostly, or a rehash of former stuff.

From my knowledge of the contracts there were other contracts issued after the date of the contract, 1906. There were none that changed the nature of the agent's authority in any respect.

I have been with the Aetna for thirty-seven years last August. During that period I knew the various Presidents, Vice-Presidents,

Secretaries, Assistant Secretaries, Treasurers and Assistant Treasurers of the company. None of them ever lived or had an office in Nash-[fol. 126] ville, Tennessee. Those gentlemen had their offices in Hartford, Connecticut, ever since I was a boy, and a good many years before. The home office of the Aetna Life Insurance is at Hartford Connecticut. I know as a fact that there is no other home office of the company except that. The company is incorporated under the laws of the State of Connecticut.

Cross-examination (?)

By Mr. Stanford:

All premium notes are printed under the direction and by the authority of the Home Office. I suppose you refer to those extension notes. Technically, a premium note is something different. Extensions notes are all printed under the direction and by authority of the home office. We have different forms. I wouldn't say we have form 1906 and form 1912.

Introduction, by defendant of the following testimony of the witness W. J. MORONEY, same being copied from the statement of facts on the former trial of this case:

I have already been sworn as a witness, and I simply want to make this statement: "That I have gone through carefully all the papers brought here by Mr. Alexander from the Nashville office, and all the papers brought here by Mr. Bidwell from the home office, and I have offered in evidence everything I can find in any of those papers, letters, correspondence, and other documents, in any way referring to the Dunken insurance policies or the authority of Mr. Alexander as agent of the company, except that I have mislaid one or two copies of letters that were offered in evidence on the former trial, and in lieu of them I have offered copies contained in the bills of exceptions taken on on the former trial.

#### *Agreement*

It is agreed by the attorneys for plaintiff, that the above testimony of said witness, W. J. Moroney, may be applied as if the witness were testifying at this time.

[fol. 127] Introduction, by defendant, of the following testimony of the witness J. A. STANFORD, who appeared in the former trial as a witness for the plaintiff, same being copied from the statement of facts made in said former trial:

I just want to state that soon after the death of Mr. Dunken, that Mrs. Dunken sent to the office of Forrester & Stanford policy No. 152,775, and quite a lot of letters, and one or two telegrams, premium receipts, notices of premiums, and so forth, and various papers pertaining to this insurance, and I have produced in court here every

written or printed document of every kind and any kind that was sent to our office pertaining to this insurance.

Introduction, by defendant, of the following testimony of the plaintiff, Mrs. PEARL STONE DUNKEN, on the former trial of this case, same being copied from the statement of facts on said former trial:

In the spring and early part of the year 1916, Mr. Dunken had equities in farms and city property. He had equities in more than one farm in the county. I believe he had equities in two farms. I don't know exactly what property in the city that he had equities in. There were several lots situated in the city. He had some business in the city, that is, lots with houses on them rental property; there were about three or four of them, I think.

He also had farm lands in New Mexico. He had farm lands outside of McLennan county in Texas. Those lands were situated in Burnet County. I don't know how many acres he had in Burnet county. I think it was grazing land that he had in Burnet County.

I could not tell you exactly the condition of the real estate on June 1st, the date of Mr. Dunken's death, as to whether he had equities then in them.

I am the administratrix of W. J. Dunken's estate. I am familiar with the property comprising this estate.

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#### EVIDENCE: EXHIBIT No. 54

Introduction, by defendant, of the following endorsement on Policy No. 98222: "Surrendered—New Number 152,775—\$10,000.00."

[fol 128] Defendant rests.

#### PLAINTIFF'S REBUTTAL TESTIMONY

##### *Admission*

It is admitted, by the attorney for the defendant, that the endorsement shown under Exhibit No. 54, on Policy No. 98222, was made at the Home Office and by authority of an executive Officer of the Company at the time the new policy was issued.

Mrs. PEARL STONE DUNKEN, plaintiff herein, being recalled, testified as follows:

##### Direct examination.

##### By Judge Spell:

It is already in evidence, I believe, in my testimony delivered on the former trial, that my husband, Wiley J. Dunken, deceased, owned a tract of land in Burnett County, but the number of acres was not

stated. I know the number of acres contained in the Burnett county tract of land. There were 1,300 acres in that tract. I also know the number of acres contained in the New Mexico tract of land, in the vicinity of Clovis, New Mexico. There were two sections in that tract.

I could not say whether there were any liens, or anything owing against those two tracts of land. I do not know of my own knowledge whether there was or was not; I couldn't say. I do know what later came of those tracts of land, of my own knowledge. I had to give them up. I had to give them up after my husband's death, not before. Mr. Wiley J. Dunken had equities in several lots and houses here in Waco; some vacant lots, and some with houses on them. There were about four or five lots, I think, and as to the houses and lots, there were two or three houses and lots that he had, that he rented out.

Cross-examination.

By Mr. Moroney:

I had to give those lots, and houses and lots up too. They were all given up for the debts that were against them. As Administrator, I haven't been able to realize anything from those properties:

It is substantially true that I was unable to realize anything from [fol. 129] the equities in real estate that Mr. Dunken had at the time of his death.

Plaintiff rests.

Defendant rests.

Testimony closed.

#### STIPULATION AND ORDER SETTLING STATEMENT OF FACTS

We, the undersigned attorneys for plaintiff and defendant hereby agree that the above and foregoing 118 and ½ pages constitute a true and correct statement of facts in cause number 23110, Mrs. Pearl Stone Dunken, Adm., vs. The Aetna Life Insurance Company, of Hartford, Connecticut, on the Third trial of said cause, this trial having been begun on the 30th day of May, A. D. 1921.

W. E. Spell, J. A. Stanford, Attorneys for Plaintiff. W. J. Moroney, Attorney for Defendant.

Approved this 11th day of July, A. D. 1921.

Prentice Oltorf, Judge Presiding.

[File endorsement omitted.]

#### STATEMENT OF FACTS

J. L. McAtee, Official Shorthand Reporter, 19th Judicial District Court, McLennan County, Tex.

(Endorsement on back cover:) 6492. Filed in Court of Civil Appeals 3rd Supreme Judicial District of Texas, Sep. 19, 1921. R. H. Connerly, Clerk. Affirmed, 11-15-22. 3.



[Title omitted]

## Appeal from the District Court of McLennan County

FINDINGS OF FACT—Filed in Court of Civil Appeals Nov. 15, 1922;  
Filed in Supreme Court of Texas Feb. 16, 1923

The appellant is a life insurance company; its home office is at Hartford, Connecticut. Its Vice-president, J. L. English, and its assistant secretary, W. H. Newell, during the times herein mentioned, were two of its executive officers. H. B. Alexander was its manager for the State of Tennessee. On December 17, 1910, Alexander took the application of W. J. Dunken for a seven-year term policy, convertible, at the option of the insured, into a twenty pay commercial policy. Appellant issued this policy, No. 98322, January 28, 1911. Thirty days grace was allowed for the payment of premium. In January 1916, Dunken decided to exercise his option to convert this policy a twenty pay commercial policy, and so informed Mr. Alexander. For the purpose of keeping the term policy alive until the conversion could be effected, Dunken executed a note, payable March 29, 1916, to the Company, for the amount of the annual premium. The first policy, together with the extension note, was sent by Alexander, together with the application for conversion, to the home office. The annual premium on the first policy was \$105.40, on the second policy, which will hereinafter be referred to as the new policy, the premium was \$277.70. Dunken desired the new policy to be dated back to the date of the first policy, which was done. Under this arrangement, the amount due by Dunken on the new policy was \$277.70, the annual premium, plus the difference between \$105.40 for five years, with interest thereon, amounting, in the aggregate, to \$1,299.97. The new policy had a loan value of \$987.00. This left a balance due on the first payment of \$312.97.

On February 28, 1916, appellant issued the new policy, No. 152,775, and sent same to Alexander, to be by him delivered to Dunken. Vice-President English, in sending this policy to Mr. Alexander, [fol. 131] wrote him as follows: "Enclosed find this policy, in exchange for 98322, surrendered." He also gave an itemized statement, showing that the cash due after deducting the loan value was \$312.97. At the time of issuing the new policy, the appellant marked the first policy surrendered, so it and the note given for its extension were no longer of any force.

On March 4, 1916, Alexander mailed the new policy to Dunken, at Waco, Texas, where Dunken then lived. It was received by Dunken on March 6th, and was retained by him to the time of his death, about June 1, 1916. Accompanying this policy was a letter from Alexander as follows:

"Mr. W. J. Dunken,  
115 S. 5th Street,  
Waco, Texas.

"Nashville, Tenn., March 4, 1916.

"DEAR MR. DUNKEN:

I take pleasure in handing you herewith your \$10,000.00 Commercial 20 pay policy converted from seven year term.

"I also enclose a loan note which must be signed by you, with two witnesses to your signature, whose addresses should be given. Also please sign the form 378, which authorizes the company to deduct the 1916 premium from the proceeds of the loan.

"The amount due now to complete the transaction is \$312.97, which is determined as follows:

Conversion cost.....	\$1,020.88
1916 premium and interest.....	279.09
	<hr/>
	\$1,299.97
Deduct net loan.....	987.00
	<hr/>
	\$312.97

"Please do not fail to send me your policy when returning the above.

"Thanking you, I remain,

Sincerely yours, H. B. Alexander, Manager."

Dunken never remitted the \$312.97, nor signed the loan form. There was no further correspondence between Dunken and Alexander, nor between Dunken and appellant. The case was tried by a jury, to whom was submitted, among others, the following special issues:

"Special Issue No. 1.—Did the Agent of defendant insurance company deliver the new policy, No. 152775, as a completed contract, [fol.132] with the intention that the same should become an effective and binding obligation from the time of receipt of same by the assured, W. J. Dunken? Answer 'Yes' or 'No.'"

Answer. "Yes."

"Special Issue No. 2.—If you have answered 'No' to the first issue, you need not answer the second issue, but if you have answered 'Yes' to the first issue, then answer this, the second issue:

"Was the delivery of said policy as a completed contract acquiesced in by any executive officer of the defendant company? Answer 'Yes' or 'No.'"

Answer. "Yes."

The evidence was sufficient to sustain those findings. Reference to the evidence will be made in this opinion, wherein we state our reasons for sustaining the findings of the jury.

This is the third appeal. An examination of our opinions on the former appeals, 204 S. W. 241, and 221 S. W. 691, will aid in understanding this case.

## OPINION

It is the contention of appellant that the policy herein sued on never became a contract for the reason that the first premium was never paid. The policy recites: "This policy shall not take effect until the first premium herein shall have been actually paid during the good health of the insured, a receipt for which payment shall be the delivery of the policy." The first premium was not paid. But the policy was delivered to the insured by Alexander, with the intention that it should become a completed contract. The evidence as to this not only sustains the finding of the jury as to issue No. 1, but is so complete that we do not deem it necessary to quote from the same.

Having found that the verdict of the jury in answer to special issue No. 1 is supported by the evidence, it becomes our duty to affirm the judgment herein, unless we should set aside the finding of the jury on the second special issue.

The evidence on the trial from which this appeal is taken is practically the same as that on the first and second trials hereof, with the addition of the evidence excluded on the first trial. In our opinion [fol. 133] on the first appeal, Chief Justice Key, speaking for the Court said:

"We can not say that there is no testimony to show either of the waivers referred to \* \* \* On the contrary, we hold that the case should go back for another trial, at which, after admitting the excluded testimony heretofore referred to, as well as other admissible evidence, the issue of waiver should be clearly submitted to the jury, and judgment should be based upon the jury's findings upon these issues." (204 S. W. 243.)

Upon the second appeal, Mr. Justice Brady, speaking for the Court, said:

"The question of waiver was a proper one for the determination of the jury." (221 S. W. 693.)

A careful examination of the record herein, in connection with the brief and oral argument of the able counsel for appellant, has afforded us no grounds for changing our opinion on this issue. If the company, knowing that the policy had been delivered without the payment of the premium, acquiesced in such delivery, it thereby ratified the same. The ratification by a principal of the unauthorized act of an agent makes the same the act of the principal, and relates back to the time when the same was done. *Evans v. McKay*, 212 S. W. 688; *Brazoria Co. v. Padgitt*, 160 S. W. 1173; *Brazoria Co. v. Rothe*, 168 S. W. 73-74.

If the principal does not intend to ratify the unauthorized act of one assuming to act as his agent, it is incumbent upon him, on receiving notice of such transaction, to promptly notify the other party thereto of the want of such authority, and his repudiation of such transaction. *Ins. Co. v. Griffin*, 59 Tex. 513; *Morrison v. Ins. Co.*,

69 Tex. 353, 363, 364; 5 Am. St. R. 66; 6 S. W. 607; Assurance Soc. v. Cole, 35 S. W. 720.

The policy was delivered to Dunken on March 6, 1916, as a completed contract. He retained possession of it to the time of his death, June 1, 1916. Neither Alexander nor the company ever notified him that Alexander had no authority to make such delivery. No [fol. 134] demand was made of him to return the policy, nor was he asked to pay the balance of the premium. If the appellant did not intend to ratify such delivery, it was its duty, upon receiving information of such delivery, to promptly notify Dunken of that *fact*, so that he might protect himself by paying the balance of the premium, if the appellant was willing to receive the same, and if not to give him the opportunity to procure other insurance.

When did the appellant learn of such delivery? Alexander was selected by appellant to make such delivery. He knew that he mailed the policy to Dunken, on March 4, 1916, and that it would probably reach him, as it did, within two days thereafter. Though Alexander may have had no authority to deliver the policy without collecting the premium, he knew that he had done so. Alexander being the agent of the appellant for the purpose of making such delivery, we think that his knowledge as to this transaction was the knowledge of the company.

But aside from this, Alexander was instructed by the Vice-President of the company, in his letter of February 28th, to report on the new policy not later than March 31st. Also he was required by the rules of the company to make semi-monthly reports on policies issued through his office. He said that he made such reports as to the policy in question, but he evaded answering as to what such reports showed. The appellant offered no evidence as to these reports. In the absence of evidence to the contrary, it must be presumed that he made truthful reports. If so, the appellant knew a few days after March 31st that the policy had been delivered, and that the premium had not been paid; and it received like information about the middle and about the last of April, 1916.

Howard E. Wright, assistant auditor of the company, was at Nashville the latter part of April and the early part of May, auditing Alexander's books. On May 1st, W. H. Newell, an executive officer of the company, wrote Mr. Wright as follows:

"Referring to Vice-president English's letter of February 28th, in [fol. 135] which Mr. Alexander was instructed to report the increase premium under No. 152775—Dunken—in his 31st March report, if he has been unable to make collection, this policy with renewal receipts should be returned."

To this letter, Wright replied on May 5, 1916, as follows:

"Referring to your letter of May 1st, addressed to the writer concerning #152775—Dunken—I have taken this matter up personally with Mr. Alexander \* \* \*. The policy together with the loan papers were sent to Mr. Dunken at Waco, Texas, by Mr. Alexander, and the matter is now in correspondence. It may be that I will go

to Waco within the next ten days, and have agreed with Mr. Alexander to complete the necessary."

If the policy had never been delivered by authority of appellant and it had not ratified the unauthorized delivery, there was nothing to "complete."

It is evident that some word was omitted by the stenographer. "Settlement" would be an appropriate word. If that was not the word intended, such fact could have been shown by Mr. Wright. In reply, Mr. Newell wrote Mr. Wright, under date of May 11th:

"The insurance has lapsed and before anything can be done it will be necessary for Mr. Dunken to submit an application for revival."

The policy could not have "lapsed", if it was never in force, and was not a subject for "revival", if it never had life. Mr. Newell, as an executive of a great life insurance corporation, is presumed to understand the meaning of those words, and to have used them advisedly.

We think this evidence is sufficient to sustain the verdict of the jury on the second issue.

It may be that the following facts influenced the appellant not to repudiate the delivery of the policy by Alexander without collecting the premium:

Alexander was not merely an agent of the company to solicit insurance. He was a state agent, and as such the company doubtless had confidence in his business ability. He had represented the company for five years in its dealings with Dunken, in reference to the [fol. 136] two \$10,000.00 policies theretofore held by him. Dunken had on several occasions failed to pay his premiums when due, for which he had given extension notes, all of which had been paid. Dunken, though hard up for cash, appears to have been solvent. The first premium on this policy differed from ordinary first premiums, in this,—it was \$1,299.97, made up of the regular annual premium of \$279.09 and the cost of converting the term policy into this policy, \$1,020.88. Of this first premium, the premiums paid by Dunken for five years on the convertible policy, and the loan value of the new policy paid \$987.00, leaving a balance due of \$312.97. Alexander was entitled to a part of this as his commission. It is evident that Alexander thought Dunken would pay this balance in a short time. The company seems to have taken this view of the matter, perhaps deeming it to its advantage to do so.

This opinion is based upon the assumption that Alexander had no authority to deliver the policy without collecting the premium, but we do not wish to be understood as so holding. The view that we take of this case renders it unnecessary for us to decide that point.

Appellant submits the proposition that the court erred in rendering judgment for attorney's fees and damages for the reason that the policy is either a Connecticut contract or a Tennessee contract, and that appellee would not, under the facts of this case, be entitled to recover attorney's fees or a penalty under the law of either of those states.



This contention as to the law of these states seems to be correct, but we hold that the policy herein is a Texas contract. Dunken was a citizen of Texas, the claim was payable in this state, and we think it immaterial that the appellant was in Connecticut, or that the application for the policy was made through an agent who resided in Tennessee. Besides this, it was admitted that appellant had a permit to do business in Texas, and was transacting business in this state. By obtaining such permit, appellant subjected itself to the laws of this state. R. S. Art. 4746; *Cravens v. Ins. Co.* 50 S. W. 519; *Ins. Co. v. Villeneuve*, 60 S. W. 1014-1017.

Finding no error of record, the judgment of the trial court is [fol. 137] affirmed.

Affirmed.

C. H. Jenkins, Associate Justice.

[File endorsement omitted]

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### COURT OF CIVIL APPEALS

[Title omitted]

JUDGMENT—Rendered Nov. 15th, 1922

*Opinion by Associate Justice Jenkins*

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the court that there was no error in the judgment; It is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellee, Mrs. Pearl Stone Dunken, Administratrix of the estate of W. J. Dunken, deceased, do have and recover of and from the appellant, The Aetna Life Insurance Company of Hartford Connecticut principal and its surety, The Aetna Casualty & Surety Company, the amount adjudged by the Court below and all costs in this behalf expended and this decision be certified below for observance.

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IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

[Title omitted]

[fol. 138] MOTION FOR REHEARING—Filed in Court of Civil Appeals Nov. 27, 1912(?); Filed in Supreme Court of Texas Feb. 16, 1923

To the honorable court aforesaid:

Now comes Appellant in the above entitled cause and respectfully prays that it be granted a rehearing herein, and that the Court set

aside the judgment for appellant, and grant such other relief as appellant may be entitled to for the following reasons, to-wit:

1. The court erred in holding that the evidence was sufficient to sustain the answer of the jury to the first special issue.

2. The Court erred in holding that the evidence was sufficient to sustain the answer of the jury to the second special issue.

3. The court erred in affirming judgment for statutory damages or penalty and attorney's fees, because

(a) Appellee not having recovered the amount demanded and sued for, as shown by the record, she is not entitled to recover damages or attorney's fees for failure of appellant to comply with her demand:

(b) The alleged contract in issue, not being a Texas contract, such recovery is in violation of the Constitution of the United States, and especially of Art. 1, Sec. X, prohibiting the passage of any law impairing the obligation of contracts, and of Art. 40, Sec. I, providing that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and of Sec. 1, of the 14th Article of Amendment providing that no State shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law.

For reasons stated in appellant's motion to postpone submission, and because of the present disability of appellant's attorney, appellant prays that it be allowed to amend this motion when appellant's attorney sufficiently recovers.

Mr. J. A. Stanford and Mr. W. E. Spell of Waco, McLennan County, Texas, are attorneys of record for appellee.

J. W. Moroney, Attorney for Appellant.

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[fol. 139] [File endorsement omitted.]

IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

No. 6492

[Title omitted]

MOTION FOR LEAVE TO FILE AMENDED MOTION FOR REHEARING—  
Filed Dec. 15, 1922

To the honorable Court of Civil Appeals:

Now comes appellant and tenders herewith its amended motion for rehearing, and respectfully shows to the Court that this amended

motion has been prepared and forwarded for filing, as promptly as practicable after appellant's attorney, W. J. Moroney, had sufficiently recovered from the surgical operation referred to in former motion for postponement, to which motion appellant refers and makes the same a part hereof for greater particularity.

Wherefore appellant prays that the amended motion for rehearing filed herewith—or tendered for filing—be duly filed by leave of court and duly considered and passed on on its merits.

Mr. W. E. Spell and Mr. J. A. Stanford, who reside at Waco, McLennan county, Texas, are attorneys of record for appellant, and appellant is mailing to said W. E. Spell a copy of this motion and a copy of said amended motion for rehearing.

Respectfully submitted, W. J. Moroney, Attorney for Appellant, Dallas, Texas.

Sworn to and subscribed by W. J. Moroney before me, this 13 day of December, 1922. J. C. Bird, Notary Public, Dallas County, Texas. (Seal.)

[File endorsement omitted]

[fol. 140]

[File endorsement omitted]

IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

No. 6492

[Title omitted]

APPELLANT'S AMENDED MOTION FOR REHEARING—Filed in Court of Civil Appeals Dec. 20; Filed in Supreme Court Feb. 16, 1923

To the honorable Court of Civil Appeals:

Now comes appellant, the Aetna Life Insurance Company, and by leave of the court, files this its amended motion for rehearing, and respectfully prays that the court set aside the judgment heretofore rendered herein and grant appellant a rehearing, and render judgment in favor of appellant, and grant appellant such other relief as it may be entitled to, for the following reasons, to-wit:

#### *Preliminary Statement*

This case involves two fundamental questions (a), whether or not under the pleadings and the evidence there was a waiver of the admitted default of the insured and (b) whether or not in any event the judgment for statutory damages and attorney's fees should be sustained under the pleadings and the evidence. These two subjects will be presented separately in the above order.

*Assignments of Error*

1. The court erred in not sustaining appellant's first assignment of error, reading as follows:

"The court erred in refusing defendant's special charge No. 1, requesting the court to direct a verdict for defendant." (Br. p. 23; Tr. p. 24.)

2. The court erred in not sustaining appellant's second assignment of error, reading as follows:

"The court erred in overruling defendant's objections and exceptions to the submission of the first special issue submitted by the court, which objections and exceptions were as follows:

[fol. 141] 'Defendant objects and excepts to the submission of special issue No. 1 because (a) there is no evidence authorizing the submission of said issue, and (b) the personal intent of H. B. Alexander is a wholly immaterial matter.' (Br. p. 23; Tr. p. 33.)

3. The court erred in not sustaining appellant's third assignment of error, reading as follows:

"The court erred in overruling defendant's objections and exceptions to the submission of the second special issue submitted by the court, which objections and exceptions are as follows:

'Defendant objects and excepts to the submission of special issue No. 2, because there is no evidence authorizing the submission of said issue.' (Br. p. 23; Tr. p. 33.)

4. The court erred in not sustaining appellant's sixth assignment of error, reading:

"The court erred in refusing defendant's special charge No. 2, reading as follows:

'You are instructed that any act of H. B. Alexander in personally providing for the payment of a premium, or in signing Dunken's notes, was the act of said Alexander personally and not the act of defendant insurance company, and you will disregard all evidence of any such acts in answering the issues submitted to you.' (Tr. p. 35; Br. p. 24.)

5. The court erred in sustaining appellant's seventh assignment of error, reading as follows:

"You are instructed that under the facts in this case defendant's agent, H. B. Alexander, had no authority to grant insurance or waive any condition of its policies or contracts, or make any agreement which shall be binding upon defendant company. (Tr. p. 35; Br. p. 25.)

6. The court erred in holding that the evidence was sufficient to sustain the finding of the jury in answer to the first special issue, which answer was, in substance, that the agent of the defendant com-

pany delivered the new policy, No. 152775, as a completed contract with the intention that the same should become an effective and binding obligation from the time of receipt of same by the insured.

7. The court erred in holding that the evidence was sufficient to [fol. 142] sustain the finding of the jury in answer to the second special issue, which answer was to the effect that the delivery of said policy as a completed contract was acquiesced in by an executive officer of the defendant company.

8. The court erred in holding that when the original policy was marked "surrendered" it and the note given for its extension were no longer of any force, it appearing that thus marking said policy was merely a preliminary and *form/a* step in the transaction that was never completed, and also because by the plain and express terms of the agreement said original policy was to continue in force until maturity of said note, on March 29, 1916, unless, in the meantime, the proposed "conversion" was completed, and if for any reason such "conversion" was not made the payment of said note on or before maturity would have kept the said original policy in force for another policy year, and said original policy remained in force by the express terms of the contract until, by the terms of the policy and the note, the policy lapsed by failure to pay said note on or before its maturity as expressly held by this court on the first appeal. (204 S. W. 240.)

9. The court erred in holding that neither Alexander nor the company ever notified the insured that Alexander had no authority to deliver the new policy without complying with the terms of the contract, it appearing that the policy itself and the copy of the application attached thereto contained ample and sufficient notice that Alexander had no such authority; that Alexander did not attempt to exercise any such authority; and that Alexander's letter to the insured, including policy, explicitly advised the insured that the terms of the contract must be complied with to complete the "conversion," which notice (if notice was required) was sufficient and binding, as expressly held by this court on the first appeal. (204 S. W. 241-243.)

[fol. 143] 10. In reference to the actual, or presumed, reports made by Alexander to the company, the court erred in holding as follows:

"The appellant offered no evidence as to these (Alexander's) reports. In the absence of evidence to the contrary it must be presumed that he made a truthful report, and if so the appellant knew a few days after March 31, 1916, that the policy had been delivered, and that the premium had not been paid. And it received like information about the last of April, 1916."

The record showing that Alexander made only one formal report referring to the Dunken insurance, and this report was introduced in evidence (S. F. p. 42), and it being wholly immaterial, in the absence of a waiver, whether or not appellant knew of Dunken's default.



11. The court erred in holding that the letter of Howard E. Wright, of May 5, 1916, does not mean what it says, and that "it is evident that some word was omitted by the stenographer," the phrase "Complete the necessary" being a common, complete, and well understood shorthand expression meaning merely to do whatever may turn out to be necessary and proper under the Company's rules and the instructions of its executive officers.

12. The court erred, as stated in the last preceding assignment, because it is wholly immaterial what Mr. Wright (who was merely an examiner for the Auditor; S. F. p. 108) might have meant by the phrase "Complete the necessary," it appearing that he had no authority to waive any of the terms or conditions of the contract.

13. The court erred in misconstruing the reply of Mr. Newell to Mr. Wright, under date of May 11, as follows: "The insurance has lapsed and before anything can be done it will be necessary for Mr. Dunken to submit an application for revival."

In this connection, the court erred in using the following language:

"The policy could not have lapsed if it never was in force, and it was not subject to revival if it never had lived. Mr. Newell, as an [fol. 144] executive of a great life insurance corporation, is presumed to understand the meaning of words, and to use them advisedly."

The court erred because the insurance involved in this case is one contract, where two successive policies were written, suit being brought in the alternative on both policies, and the second policy having been written in accordance with an option for conversion granted by the first policy, but such attempted conversion was never completed and the only insurance that was ever in force did in fact "lapse" by failure of the insured to pay the note maturing March 29, 1916, as held by this court on the first appeal, and the language of Mr. Newell was therefore not only plain, but technically accurate.

14. The court erred in affirming the judgment in this case, because it appears from the opinion that such affirmance is predicated wholly on alleged or surmised acts and omissions occurring subsequent to the mailing of the letter of Alexander to Dunken, dated March 4, 1916, and including the new policy, it appearing, first, that plaintiff has no pleading alleging any act or omission of waiver after the mailing of said letter, and, second, that no act or omission of waiver is shown by the evidence. The judgment is erroneously affirmed on a ground that is wholly without support in either the pleading or the evidence.

15. The Court erred in its opinion, as follows:

"He (Alexander) stated that he made such reports as to the policy in question, but he evaded answering as to what such reports showed." it conclusively appearing that all reports, letters and other

documents in any way referring to the Dunken insurance in Alexander's office or in the Home Office, were produced in open court; that all such documents deemed material by either party were offered in evidence, and that the only formal report ever made on the Dunken insurance is copied in the statement of facts, page 47.

*Statement under the Foregoing Assignments of Error*

Plaintiff's pleadings consist of a first amended original petition (Tr. p. 2-7) and a second supplemental petition (Tr. p. 17-27).

These pleadings undertake to allege, with much elaboration, a [fol. 145] "course of dealing" leading up to the mailing of the letter dated March 4, 1916, from Alexander to Dunken, but there is no allegation whatever even in the most general terms, of any act or omission of waiver subsequent to the said date.

In order to show that all evidence in existence on the matters in issue was offered in evidence, it becomes necessary to make a rather full statement.

It appears that there have been three trials of this case; that on the first trial of Mr. Alexander, the Company's agent at Nashville, and Mr. Bidwell, Supervisor of Claims at the Home Office, were personally present, and testified that they then produced all documents bearing on the case either at Nashville or the Home Office; that all such written evidence deemed material by either plaintiffs or defendant was admitted in evidence and embraced in the statement of facts—except certain correspondence offered by the defendant and excluded by the court, but which was incorporated in the bills of exception and embraced in the record—which was therefore complete, and that such correspondence thus copied in the bills of exception on the first trial was admitted in evidence on the second and third trial, in accordance with the opinion of this court on the first appeal. (204 S. W. 241, 243; S. F. pp. 86, 80.)

It also appears that the statement of facts on the first trial was, by agreement, used on the second and third trials except that plaintiff insisted that Mr. Alexander's depositions be taken, it being impracticable for him to come from Nashville to Waco again. It also appears that all such documents were delivered to the court, or to the court reporter, and that Mr. Alexander did not have them when he testified by deposition, except as he may have had duplicates in his own office. This fully appears as follows:

On January 13, 1917, defendant's attorney wrote the following letter to Mr. Alexander:

"Mr. H. B. Alexander, Manager,  
824 Stahlman Building,  
Nashville, Tenn.

DEAR SIR:

[fol. 146] I have your favor of the 11th instant. I also expect Mr. Bidwell to be present at the trial. Please bring with you all original

contracts between the Company and yourself and the firm of Burbank & Alexander; also all general and special instructions showing your authority, and all correspondence and other papers about any Dunken policies, either with Dunken or with the Company, or with anybody else, from the beginning.

Please also have with you the official publication containing the Tennessee statute on the subject of life insurance, attorney's fees, etc., of which you sent me copies some time ago. Please report to me promptly when you reach Dallas, and oblige," (S. F. pp. 86-87).

On the same day, the defendant's attorney sent the following telegram to Mr. Bidwell:

"F. W. Bidwell,  
Care Aetna Life Insurance Co.,  
Hartford, Conn.:

Your letter 9th received, Dunken case set specially for 22nd. I desire your presence. Meet me in Dallas not later than 20th. Bring all original contracts with Alexander and Burbank & Alexander, also all general and special instructions showing their authority, and all correspondence and other papers about any Dunken policies from beginning. I have also asked Alexander to come. Am writing." (S. F. p. 86.)

Mr. Alexander testified, by deposition, as follows:

"Prior to the institution of this suit I furnished to Forrester & Stanford, attorneys for plaintiff, all the correspondence that I had, so far as I recall it, pertaining to this case. I testified in person on the former trial of this case, at Waco, Texas, and I produced all correspondence and other papers that I had at my command referring in any way to Mr. Dunken's insurance policies, and so far as I know all such papers were submitted to plaintiff's attorneys for examination." (S. F. p. 99.)

Mr. Alexander also testified as follows:

"I did have some correspondence with Mr. Dunken about the life insurance involved in this litigation, but all of the correspondence that I had copies of was turned over—as I recall it—to the Court on the first trial of this case at Waco, Texas. I have furnished the [fol. 147] originals or copies of all correspondence that I had. There were a number of notices sent to Mr. Dunken in regard to the payment of his premiums, and perhaps some letters that were written by me in person that I had no copies of. All correspondence that I had, as stated above, was furnished to the court and I have none in my possession at present. (S. F. p. 96.)

Mr. Alexander also testified as follows:

"W. J. Dunken was notified that his note for \$106.45 dated February 26, 1916, was due, as stated in the note, and as to what correspondence was had directly on this will be shown by the letters and correspondence as filed with the court in this case, provided I kept

copies of such correspondence but, as stated above, most of the notices of extension and premiums were sent out on printed forms, of which no copies were kept \* \* \* I wrote Mr. Dunken on March 4, 1916, inclosing his new policy No. 152,775, as stated in my letter, and presume all of the conditions as to the delivery of said policy are stated in the letter, of which I kept no copy, but same was furnished to the court and is now on file there. (S. F. pp. 48-49-101.)

"Yes, W. J. Dunken was notified that his note for \$106.45 dated February 26, 1916, was due as stated in the note, and as to what correspondence was had directly on this will be shown by the letter and correspondence as filed with the court in this case, provided I kept copies of such correspondence. But, as stated above, most of the notices of extension notes and premiums were sent out on printed forms of which no copies were kept." (S. F. 101.)

Mr. Alexander also testified as follows:

"I have every reason to believe that the inclosures were actually inclosed with my letter of March 4, 1916. They were sent out by the cashier of the company's agency at Nashville, under my direction. I did not receive any answer whatever to said letter, nor of the sums mentioned in said letter, and he did not return to me any instruments mentioned in said letter. I do not remember having written any personal letters to Mr. Dunken after March 4, 1916, but I constantly reminded my office force in regard to the necessity of Mr. Dunken taking action immediately.

[fol. 148] Most of such notices were usually sent out on printed forms, and no copies kept. But I can't say positively, in this case, as to what notices or communications were sent to Mr. Dunken, but there were some changes or importance being made in my office at that time, which caused quite a disturbance of our office force and work." (S. F. pp. 97-98.)

W. J. Moroney, attorney for defendant, testified as follows:

"I have already been sworn as a witness and simply want to make this statement—that I have gone through carefully *ann* the papers brought here by Mr. Alexander from the Nashville office, and all papers brought here by Mr. Bidwell from the Home Office, and I have offered in evidence everything I can find in any of these papers, letters, correspondence and other documents, in any way referring to the Dunken insurance policies, or the authority of Mr. Alexander as agent of the company, except that I have mislaid one or two of the copies of letters that were offered in evidence on the former trial, and in lieu of them, I have offered copies contained in the bills of exception taken on the former trial." (S. F. pp. 115-116.)

Mr. J. A. Stanford, attorney for plaintiff, testified as follows:

"I just want to state that soon after the death of Mr. Dunken, Mrs. Dunken sent to the office of Forrester & Stanford, Policy No. 152,775, and quite a lot of letters and one or two telegrams, premium receipts, notices or premiums, etc., and various papers pertaining to

this insurance, and I have produced in court here every written or printed document of every kind, and any kind, that was sent to our office pertaining to this insurance." (S. F. p. 116.)

By agreement, the statement of facts, etc. of the former trials were used in evidence on the last trial except that there was no agreement to reproduce the former testimony of Alexander, and it therefore became necessary to take his deposition. (S. F. p. 6.)

Defendant's attorney, in sending papers to Mr. Alexander, to have his deposition taken, sent him the following letter:

"Dallas, Texas, January 2, 1919.

Mr. H. B. Alexander,  
Nashville, Tenn.

DEAR SIR:

[fol. 149] In *Dunken v. Aetna Life Insurance Company*, pending at Waco, Texas, I inclose papers to take your deposition, as follows:

1. Direct and cross-interrogatories, with waiver of commission, etc.
2. Printed form of instructions to Notary.
3. Envelope in which to return deposition, all blanks to be carefully filled.

Please select a thoroughly competent and experienced Notary and see to it, if you are able to do so, that clear, direct and complete answers are given to all questions. If, for any reason, you are unable to answer any of said questions fully state why you can not do so.

Since I prepared the direct interrogatories it has occurred to me that all, or nearly all, of the papers referred to were turned over by you at the former trial. I have not gone through my files to learn what papers I have. If you are unable to attach the original papers, or copies of papers, you should state in your answers why you can not do so.

Please pay the Notary fee. The notary should attach to his certificate a receipt showing that this fee was paid by defendant.

Please mail me a carbon copy of your answers to the interrogatories for my files, and complete the deposition as promptly as practicable consistent with due care.

As you are required to return this original letter with deposition, I inclose a carbon copy for your files." (S. F. pp. 80-81.)

It does not appear from the record that any objection was made to the deposition of Mr. Alexander on account of any of his answers being incomplete or "evasive," and it clearly appears, by reasonable interpretation, that he furnished a copy of the only formal report he made referring in any way to the *Dunken* insurance, properly omitting copies of reports on other matters. (S. F. pp. 46-47), and it clearly appears that everything he reported, and every scrap of documentary evidence referring to the *Dunken* insurance in the



office of Alexander or at the home office was actually produced on the first trial, and embraced in the record, so far as either party deemed [fol. 150] it material, and which record was admitted in evidence on the last trial so far as either party deemed it material.

It also appears that on the first trial, Mr. Alexander, from the Nashville office, and Mr. Bidwell, from the home office, testified in person, when they were subject to direct and cross-examination in open court, with all documents present, and there is nothing in the record indicating in the slightest degree that either witness failed to answer with the utmost candor.

In order to eliminate all uncertainty and occasion for further enquiry, and in view of what has been stated, the following agreement was made in open court:

"It is admitted that the record shows that the letter of March 4th, 1917, was the end of the correspondence between Dunken and the defendant company or its agents, and that Dunken received no further notice from the company." (S. F. p. 33.)

It was agreed on the trial that the note maturing March 29, 1916, was not paid, whereupon, by the express terms of the note and policy, the original policy lapsed. (S. F. 42-26.)

The following agreements were also made on the trial:

"It is agreed by and between attorneys for both sides that copies of letters and other documentary evidence may be offered in evidence in this case, without the necessity of proving their execution, and that either a copy of the original of any such documentary evidence may be introduced without proof of their execution;

"It is further agreed, for the purpose of the record, that either side may read excerpts from the statements of facts made of the former trials of this case, without the necessity of further proving them up." (S. F. p. 6.)

It is admitted by defendant that letter dated March 4, 1916, together with enclosures contained in it, and that policy 152775 and loan papers, were all found in Dunken's iron safe after his death, where he kept this other valuable papers, and had been there from the [fol. 151] time he received them. (Exhibit 26, page 32 of this S. F.) (S. F. p. 42.)

It also appears by the record that the insurance company sent to Mr. Alexander a form of "blanket receipt," for premiums on the new policy to January 28, 1916, (the new policy having been dated back to January 28, 1911), and also a form of receipt for the annual premium on the new policy due in advance, on January 28, 1916, and these receipts were charged by the company to Mr. Alexander, and credited to him when they were returned unpaid, one of April 28, 1916, and the other on May 10, 1916, the difference in date being explained by the correspondence with Mr. Wright, showing that these forms of receipt were returned for credit on the respective dates that they were found in Mr. Alexander's office. (S. F. pp. 84, 85, 86, 87, 88.) It thus appears by every act of the company shown by the record that the company treated the entire insurance as lapsed

and of no further force and effect from the time the home office first learned that the contract had not been completed, and including the time when this court, according to its opinion, merely surmises without any evidence, and directly against the plain and uncontradicted evidence, that the company may possibly have treated the insurance as still in full force and effect.

### *Argument*

(a) It is of course elementary that it was necessary for plaintiff to plead any waiver on which she relied, that the burden of proof was on plaintiff to prove the facts substantially as alleged and that these facts must be at least sufficient as a matter of law to support the finding of waiver as a matter of fact.

It is also elementary that even if a waiver had been proved it would be of no avail to plaintiff unless it was alleged by her, at least in general terms. This court having found, in effect, that there was no waiver, of the default before it occurred—an obviously correct conclusion—and there being no allegation whatever of any subsequent waiver, it necessarily follows that on the issue of waiver—the only issue on the main and primary question of liability—plaintiff has completely failed, whatever construction may be placed on the subsequent correspondence between the Hartford and Nashville offices. [fol. 152] (b) That this correspondence not only shows no waiver, but that it completely and affirmatively disproves any claim of waiver, seems too plain for argument, when the record is fully understood, even if a waiver had been alleged by plaintiff, which was not done. This was obviously the view of this court on the first appeal, where this court held that it was prejudicial error to exclude this correspondence when offered by defendant company. If this correspondence tended to show a waiver, and unless it at least tended to show the contrary, its exclusion, if error at all, would have been harmless error, and no ground for reversal. Now, I infer, the position of this court is completely reversed. Correspondence to whose admission plaintiff earnestly objected, seems now to be made the main ground for affirming a judgment in her favor.

It was and is my opinion that it was not legally necessary for defendant to introduce this correspondence, and I so contended on the first appeal. However, it was not considered advisable unnecessarily to inject a possibly debated question, and it is the policy of defendant company to produce everything in its possession that even a layman might consider significant—a policy of some importance to a company constantly dealing with the general public. In view of the foregoing statement, and the entire record, I can not even imagine how the company could have done more than in fact it did in accordance with this policy.

Under certain conditions the unexplained withholding of material evidence shown to be in possession of a party is a circumstance warranting an unfavorable inference. But this principle never warrants the substitution of mere surmise or suspicion for evidence, or building presumption on presumption. And most clearly it does

not apply where, as in this case, it affirmatively and conclusively appears that the defendant actually produced in open court every scrap of evidence it had, whether material or not, and that all such evidence deemed material by either party was actually introduced in evidence. There is nothing in the present record indicating that [fol. 153] any evidence offered by either party was excluded, and the statement of facts, prepared by the official reporter, is approved by both parties. (S. F. p. 119). Nevertheless, unless I misconstrue the court's opinion, it is first presumed, in the face of direct, affirmative and conclusive evidence to the contrary, (which I must assume that the court overlooks), that defendant might have some documents it did not produce, and it is next presumed that such supposititious documents, if produced might help a case wholly without support in either the pleading or the evidence, and where the burden of proof was on plaintiff. This, I submit, is plain error.

I confess that I am puzzled in trying to discover why the court says that Mr. Alexander answered "evasively" in his deposition. With one exception to be noted, the record does not contain copies of the questions propounded to Mr. Alexander, his deposition having been reduced to narrative form by the official reporter. (S. F. pp. 95-106.) One question and answer is quoted in full. (S. F. pp. 46-47.) It appears that Mr. Alexander made regular reports on his entire business to the home office, but he was asked to furnish copies of such reports only as referred to the Dunken insurance. In reply he furnished a copy of one report referring to the return for cancellation of the first Dunken policy, and also referring to policies in favor of various other parties—with whom we are not concerned. (S. F. p. 47.) The only fair construction of his answer is that this is the only report referring to the Dunken insurance. Certainly if there had been any other reports they would be in the record, because every paper in existence was before the court on the first trial, and this court should presume that if there had been any other report helpful in any way to plaintiff it would have been introduced in evidence then, and again introduced on the last trial under the agreement shown in statement of facts, page 6, and heretofore quoted in full.

After first presuming, contrary to the undisputed evidence, that Alexander made reports not shown by the record, this court says that "in the absence of evidence to the contrary it must be presumed that he made truthful report."

[fol. 154] But for the sake of the argument, let us accept this presumption on a presumption. What is the ruth—the whole, undisputed and mutually admitted truth? The whole truth is that Mr. Alexander mailed the second policy to Mr. Dunken with a letter, quoted in the court's opinion, which Mr. Dunken received nearly three months before his death, and to which he never replied. If it be presumed, contrary to the record, that Mr. Alexander fully and truthfully reported this fact to the company, once or many times, it does not, standing by itself, help plaintiff's case in the slightest degree, but rather it completely rebuts her contention, as expressly held by this court on the first appeal (204 S. W. 241-243).

It is not deemed necessary to discuss the various matters and surmises referred to in the court's opinion, that possibly might have influenced the company to be indulgent to Mr. Dunken, or to waive his default, if an application for revival had been made. Such actual or hypothetical considerations are for the company, not the courts, and not even for the company unless an application for revival is made, or unless, as held by the Supreme Court in the *Ellis* case, the company does some "unequivocal act" clearly indicating an intention to waive the default. There is absolutely nothing of that character in this case.

I will not here repeat the arguments in my original brief, or again cite the authorities cited in my brief, in my supplemental argument filed October 4, and my supplemental citation of authorities filed October 17, but I earnestly request that these authorities and arguments be carefully reconsidered.

I will now proceed to the question of statutory damages and attorney's fees.

#### *Sixteenth Assignment of Error*

The court erred in overruling and not sustaining appellant's eleventh assignment of error (Tr. p. 43, Br. p. 27), excepting to the judgment of the trial court on the following grounds:

"To the judgment for damages and attorney's fees, because (1) plaintiff not having recovered the full amount sued for, the statute [fol. 155] is not applicable in any event, and (2) because the evidence conclusively shows that said policy, even if a completed contract, is not a Texas contract, or governed by the Texas statutes authorizing the recovery of damages and attorney's fees as therein provided; that said alleged policy is governed by the laws of the State of Tennessee (or if not, it is governed by the laws of the State of Connecticut); that under the laws of Tennessee and Connecticut no damages, penalty or attorney's fees can be recovered under the facts of this case, and that to construe said Texas statute as applying to said policy, would be in violation of the Constitution of the United States, and especially of Article I, Section X, prohibiting the passage of any law impairing the obligation of contracts, and of Article 40, Section 1, providing that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and of Section 1, of the Fourteenth Article of Amendment, providing that no State shall make or enforce any law that shall abridge privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law."

#### *Statement*

The only allegation of a statutory demand made by plaintiff is contained in her petition (Tr. p. 7), alleging that she had demanded \$10,000 the full face of the policy.

The only evidence of any demand is an agreement embraced in the statement of facts, page 6, as follows:

"It is further agreed, that proof of death of the deceased was waived by the defendant insurance company, and that the necessary statutory demand in order to entitle the plaintiff to twelve per cent damages, and to reasonable attorney's fees, was made by the plaintiff provided, under other facts in this case, the plaintiff is entitled to recover such penalty."

Under the "other facts of this case," plaintiff actually recovered judgment for the principal sum of only eighty-seven hundred dollars [fol. 156] lars (Tr. p. 39).

The pleadings and evidence showing that this policy, if a contract at all, is not a Texas contract, and that under the laws of the State where the alleged contract was made, no damages or attorney's fee are recoverable under the facts of this case, are fully stated in appellant's original brief, pages 4-21, to which reference is made.

#### *Argument*

Under the authorities cited in appellant's supplemental argument, Par. 2, filed October 4, 1922, it is plain that as appellant did not recover the amount demanded she is not entitled to recover statutory damages and attorney's fee, even if it be held that this case is governed by the Texas statute.

If the policy in question is a Tennessee contract, which it plainly is, if it is a contract at all, it will not be seriously contended. I suppose, that plaintiff is entitled to damages and attorney's fee under the Texas statute.

The fact alluded to by the court, that the company was doing business in Texas, is wholly immaterial and irrelevant, it appearing that no Texas agent ever had anything to do with the transaction, and that if the policy was ever delivered at all, as a completed contract it was delivered when it was mailed at Nashville, Tenn.

Mr. W. E. Spell and Mr. J. A. Stanford, who reside at Waco, McLennan county, Texas, are attorneys of record for appellee.

Appellant respectfully prays that it be granted a rehearing, that the judgment of the trial court be reversed, and that appellant have such other relief as it may be entitled to.

Respectfully submitted, W. J. Moroney, Attorney for Appellant, Dallas, Texas.

[File endorsement omitted.]



[fol. 157]

## IN COURT OF CIVIL APPEALS

## JOURNAL ENTRIES OF ORDERS OVERRULING MOTION FOR REHEARING

*(Order Made Dec. 20, 1922)*

Motion 5648; #6492; Aetna Life Insurance Company vs. Mrs. Pearl Stone Dunken, Administratrix; Appeal from McLennan County; Motion for rehearing; submitted.

*(Order Made Dec. 20, 1922)*

Motion 5663; 6492; Aetna Life Insurance Company of Hartford, Conn., vs. Mrs. Pearl Stone Dunken, Administratrix, appeal from McLennan County; Motion for leave to file amended motion for rehearing; the motion is submitted and granted and the amended motion is ordered filed and docketed and is submitted.

*(Orders Made Jan. 17th, 1923)*

Motion 5648; #6492; Aetna Life Insurance Company of Hartford, Conn. vs. Mrs. Pears Stone Dunken, Administratrix; appeal from McLennan County; Motion for a rehearing; the motion is overruled.

Motion 5665; Aetna Life Insurance Company of Hartford, Connecticut vs. Mrs. Pearl Stone Dunken, Administratrix; appeal from McLennan County; Amended Motion for a rehearing; the motion is overruled.

## IN SUPREME COURT OF TEXAS

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed in Court of Civil Appeals Feb. 15, 1923; Filed in Supreme Court of Texas Feb. 16, 1923.

To the Supreme Court of Texas:

Now comes petitioner, the Aetna Life Insurance Company, of Hartford, Connecticut, and respectfully shows to the court as follows:

This suit was brought in the Nineteenth Judicial District Court of McLennan County, Texas, by Mrs. Pearl Stone Dunken, Administratrix of the Estate of Wiley J. Dunken, deceased, against the Aetna Life Insurance Company, of Hartford, Connecticut, a Connecticut corporation.

This suit was in the alternative on two alleged policies of \$10,000.00 each issued by defendant on the life of said Wiley J. Dunken, both policies constituting successive stages of one and the same insurance contract, the first policy being a "convertible term" policy,

[fol. 158] giving the insured the option, on stated terms and conditions, to "convert" it into a policy of different form.

All negotiations with the insured were conducted by the Nashville, Tennessee, agent of the Company, the first policy having been delivered at Nashville, where the insured then resided, and the second or "converted" policy having been mailed several years later (subject to stated and proper terms and conditions that were never complied with) to the insured at Waco, Texas, where the insured resided at that time. No Texas representative of the Company had any connection with the transaction at any stage. The second policy was written at the request of the insured in the exercise of an option given by the first policy, there being otherwise no change in the original contract, which was negotiated and delivered in Tennessee. Both policies were by their terms payable at the Home Office of the Company at Hartford, Connecticut. It was established under proper pleadings, and it is not disputed, that under the laws of Tennessee and Connecticut no statutory penalty, damages or attorney's fees could be recovered.

Plaintiff, alleging a statutory demand for the full amount of \$10,000.00, on the theory that one policy or the other was in force when the insured died, brought suit to recover \$10,000.00 with damages and attorney's fees under the Texas Statute; and on the last trial (there having been two previous trials and appeals) recovered judgment on the second or "converted" policy for \$8,700.00 (being the face of the policy less \$1,300.00 unpaid premiums), \$2,566.50 interest, and \$1,044.00 damages and \$3,000.00 attorney's fees under the Texas Statute, total \$15,310.50.

Stated in general terms the defenses to the suit were as follows:

(a) That the first policy had lapsed by failure to pay premiums, and that the second or "converted" policy never went into effect because the insured failed and refused to comply with the terms and conditions on which it was issued. These defenses were conclusively established, unless they were waived; and, on the question of plaintiff's right to recover at all, the issue of waiver is the only issue in the case.

[fol. 159] (b) That there was no evidence whatever to support a finding of waiver, but that, on the contrary, the evidence affirmatively and conclusively established that there was no waiver.

(c) That plaintiff having failed to recover the full amount demanded and sued for, she is not entitled to recover statutory damages and attorney's fees, even if the Texas Statute is otherwise applicable to this case.

(d) That the policies are not Texas contracts, but that they are governed by the law of either Tennessee or Connecticut, under which damages and attorney's fees can not be recovered; and that to hold otherwise the statute would be in violation of the Constitution of the United States, because (1) as thus construed it would impair the obligations of said contract; (2) as thus construed it would deprive defendant of its property without due process of law;

and (3) as thus construed it would deprive defendant of the equal protection of the law.

The above defenses, in various and appropriate ways, were presented at all proper stages of the proceedings, in the District Court and Court of Civil Appeals, and they are now presented here.

The defendant appealed to said Court of Civil Appeals, which affirmed the judgment, and overruled a motion for rehearing which presented each and all of the errors assigned in this petition; and therefore your petitioner, said Aetna Life Insurance Company, applies to the Supreme Court of Texas for a writ of error.

### *Grounds of Jurisdiction*

This case is one of which the Supreme Court has jurisdiction under R. S. Article 1521, as amended, the amount in controversy exceeding \$1,000.00 and presenting the correctness of each of the following propositions as questions properly raised by the record:

1. That the Court of Civil Appeals committed an error of substantive law in affirming the judgment on the ground of waiver, the record affirmatively and conclusively showing that there was no waiver, the alleged circumstances alluded to in the opinion being [fol. 160] either legally insufficient or purely speculative and without support in the record, or directly contrary to the record, and it being conclusively established, and undisputed, that such alleged waiver was the only ground for affirmance. It is submitted that an error of law was thus committed of such importance to the jurisprudence of the State as to require correction.

2. The opinion and judgment of the Court of Civil Appeals is in direct conflict with the opinions of the Supreme Court in the following cases: *Aetna Life Ins. Co. v. Wimberly*, 102 Tex. 46, followed in *Southland Life Ins. Co. vs. Hopkins*, 244 S. W. 989 (November 15, 1922), in each of which cases, under facts not distinguishable in principle from this case, the Supreme Court held that time is of the essence of the contract, and that a waiver can not be inferred from the mere supposition that an extension probably would have been granted, or a default waived, if application had been made,—which is in direct conflict with the actual holding of the Court of Civil Appeals in this case, under the undisputed facts shown by the record. In each of the cases cited the judgment of the Court of Civil Appeals was reversed and rendered.

3. The opinion and judgment of the Court of Civil Appeals are in direct conflict with the Court of Civil Appeals and the Supreme Court in *Aetna Life Ins. Co. v. Hocker*, 89 S. W. 26, holding that no recovery can be had on an uncompleted contract, although there was some evidence of a physical delivery of the policy, but the stipulated terms had not been complied with. The court holds that "Hocker's inability to testify would not aid in establishing a fact that required testimony to substantiate it", and that "conjecture is not proof".

In the Hocker case the judgment of the District Court was reversed and rendered, and the Supreme Court denied a writ of error (89 S. W. 26).

4. In affirming the judgment for statutory damages and attorney's fees, although plaintiff recovered \$1,300.00 less than the amount demanded and sued for, the judgment of the Court of Civil Appeals [fol. 161] is in direct conflict with the following cases in the Courts of Civil Appeals:—First Texas Prudential Ins. Co. vs. Smallwood, 242 S. W. 498; National Life Ins. Co. v. Mouton, 242 S. W. 782; American National Ins. Co. v. Turner, 226 S. W. 487. These cases are in conflict with other cases cited in the opinions. In Manhattan Life Ins. Co. v. Stubbs, 234 S. W. 1099, 1105 (Commission of Appeals), this conflict is recognized, but it was held that the question was not presented in the Stubbs case. However, it is squarely presented in the instant case.

5. This case involved the construction of Revised Statutes, Article 4746, on the subject of damages and attorney's fees, and it also involves the question of the validity of such Statute, under the State and Federal Constitutions, as applied to the facts of this case, where the Texas Statute is held applicable to the contracts of other states, and to cases where plaintiff recovers less than the amount demanded and sued for, such Federal questions being duly presented in the record.

Having thus presented the fundamental ground of jurisdiction, petitioner will next present its assignments of error, adopted from its motion for rehearing in the Court of Civil Appeals. As stated in said motion; the case involved two fundamental questions: (a) Whether or not there was any evidence, under the pleadings, of a waiver of the admitted default of the insured; and (b) whether or not in any event the judgment for statutory damages and attorney's fees should be sustained under the pleadings and the evidence.

In accordance with what is understood to be the correct practice, the assignments of error on these two fundamental questions will be grouped accordingly.

#### *First Assignment of Error*

The Court of Civil Appeals erred in each and all of its rulings, as follows:

1. The Court erred in not sustaining appellant's first assignment of error, reading as follows:

"The Court erred in refusing defendant's special charge No. 1, requesting the Court to direct a verdict for defendant." (Br. p. 23; Tr. p. 24.)

[fol. 162] 2. The Court erred in not sustaining appellant's second assignment of error, reading as follows:

"The Court erred in overruling defendant's objections and exceptions to the submission of the first special issue submitted by the Court, which objections and exceptions were as follows:

'Defendant objects and excepts to the submission of special issue No. 1, because (a) there is no evidence authorizing the submission of said issue, and (b) the personal intent of H. B. Alexander is a wholly immaterial matter.' " (Br. p. 23; Tr. p. 33.)

3. The Court erred in not sustaining appellant's third assignment of error, reading as follows:

"The court erred in overruling defendant's objections and exceptions to the submission of the second special issue submitted by the Court, which objections and exceptions are as follows:

'Defendant objects and excepts to the submission of special issue No. 2, because there is no evidence authorizing the submission of said issue.' " (Br. p. 23; Tr. p. 33.)

4. The court erred in not sustaining appellant's sixth assignment of error, reading:

"The Court erred in refusing defendant's special charge No. 2, reading as follows:

'You are instructed that any act of H. B. Alexander in personally providing for the payment of a premium, or in signing Dunkens notes, was the act of said Alexander personally, and not the act of defendant Insurance Company; and you will disregard all evidence of any such acts in answering the issues submitted to you.' " (Br. p. 24; Tr. p. 35.)

5. The Court erred in not sustaining appellant's seventh assignment of error, reading:

"The Court erred in refusing defendant's special charge No. 3 reading as follows:

'You are instructed that under the facts in this case defendant's agent, H. B. Alexander, had no authority to grant insurance or to waive any condition of its policies or contracts, or make any agree-[fol. 163] ment which shall be binding upon defendant Company.' " (Br. p. 25; Tr. p. 35.)

6. The Court erred in holding that the evidence was sufficient to sustain the finding of the jury in answer to the first special issue, which answer was, in substance, that the agent of defendant Company delivered the new policy, No. 152775, as a completed contract, with the intention that the same should become an effective and binding obligation from the time of receipt of same by the insured.

7. The Court erred in holding that the evidence was sufficient to sustain the finding of the jury in answer to the second special issue, which answer was to the effect that the delivery of said policy as a completed contract was acquiesced in by an executive officer of defendant Company.

8. The court erred in holding that when the original policy was marked "surrendered" it and the note given for its extension were no longer of any force, it appearing that thus marking said policy was merely a preliminary and formal step in the transaction that was



never completed, and also because by the plain and express terms of the agreement said original policy was to continue in force until the maturity of said note, on March 29, 1916, unless in the meantime the proposed "conversion" was completed; and if for any reason such "conversion" was not made the payment of said note on or before maturity would have kept the said original policy in force for another policy year; and said original policy remained in force by the express terms of the contract until, by the terms of the policy and the note, the policy lapsed by failure to pay said note on or before its maturity, as expressly held by this court on the first appeal. (204 S. W. 240.)

9. The Court erred in holding that neither Alexander nor the Company ever notified the insured that Alexander had no authority to deliver the new policy without complying with the terms of the contract, it appearing that the policy itself and the copy of the application attached thereto contained ample and sufficient notice that Alexander had no such authority; that Alexander did not attempt to exercise any such authority; and that Alexander's letter to the insured, enclosing policy, explicitly advised the insured that the [fol. 164] terms of the contract must be complied with to complete the "conversion"; which notice (if notice was required) was sufficient and binding, as expressly held by this Court on the first appeal (204 S. W. 241).

10. In referring to the actual or presumed reports made by Alexander to the Company, the Court erred in holding as follows:

"The appellant offered no evidence as to these (Alexander's) reports. In the absence of evidence to the contrary it must be presumed that he made a truthful report, and if so the appellant knew a few days after March 31, 1916, that the policy had been delivered, and that the premium had not been paid. And it received like information about the last of April, 1916," the record showing that Alexander made only one formal report referring to the Dunken insurance, and this report was introduced in evidence (S. F. p. 42); and it being wholly immaterial, in the absence of a waiver, whether or not appellant knew of Dunken's default.

11. The Court erred in holding that the letter of Howard E. Wright, of May 5, 1916, does not mean what it says, and that "It is evident that some word was omitted by the stenographer," the phrase "Complete the necessary," being a common, complete, and well understood shorthand expression meaning merely to do whatever may turn out to be necessary and proper under the Company's rule and the instructions of its executive officers.

12. The court erred, as stated in the last preceding assignment, because it is wholly immaterial what Mr. Wright (who was merely an examiner for the Auditor; S. F. p. 108) might have meant by the phrase "Complete the necessary," it appearing that he had no authority to waive any of the terms or conditions of the contract.

13. The Court erred in misconstruing the reply of Mr. Newell to Mr. Wright, under date of May 11, as follows: "The insurance has lapsed, and before anything can be done it will be necessary for Mr. Dunken to submit an application for revival."

In this connection the court erred in using the following language: [fol. 165] "The policy could not have lapsed if it never was in force, and it was not subject to revival if it never had lived. Mr. Newell, as an executive of a great life insurance company, is presumed to understand the meaning of words, and to use them advisedly."

The Court erred because the insurance involved in this case is one contract, where the successive policies were written, suit being brought in the alternative on both policies, and the second policy having been written in accordance with an option for conversion granted by the first policy, but such attempted conversion was never completed, and the only insurance that was ever in force did in fact "lapse" by failure of the insured to pay the note maturing March 29, 1916, as held by this Court on the first appeal; and the language of Mr. Newell was therefore not only plain, but technically accurate.

14. The Court erred in affirming the judgment in this case, because it appears from the opinion that such affirmance is predicated wholly on alleged or surmised acts or omissions occurring subsequent to the mailing of the letter of Alexander to Dunken, dated March 4, 1916, and enclosing the new policy; it appearing, first, that plaintiff has no pleading alleging any act or omission of waiver after the mailing of said letter; and, second, that no act or omission of waiver is shown by the evidence. The judgment is erroneously affirmed on ground that is wholly without support in either the pleadings or the evidence.

15. The court erred in its opinion, as follows:

"He (Alexander) stated that he made such reports as to the policy in question, but he evaded answering as to what such reports showed," it conclusively appearing that all reports, letters and other documents in any way referring to the Dunken insurance in Alexander's office, or in the Home Office, were produced in open court; that all such documents deemed material by either party were offered in evidence, and that the only formal report ever made on the Dunken insurance is copied in the statement of facts, p. 47.

[fol. 166] *Statement under the Foreign Assignments of Error*

Plaintiff's pleadings consist of a first amended original petition (Tr. pp. 2-7) and a second supplemental petition (Tr. pp. 17-27).

These pleadings undertake to allege, with much elaboration, a "Course of dealing" leading up to the mailing of the letter dated March 4, 1916, from Alexander to Dunken; but there is no allegation

whatever, even in the most general terms, of any act or omission of waiver subsequent to said date.

In order to show that all evidence in existence on the matters in issue was offered in evidence, it becomes necessary to make a rather full statement.

It appears that there have been three trials of this case; that on the first trial Mr. Alexander, the Company's agent at Nashville, and Mr. Bidwell, Supervisor of Claims at the Home Office, were personally present, and testified that they then produced all documents bearing on the case either at Nashville or the Home Office; that all such written evidence deemed material by either plaintiff or defendant was admitted in evidence and embraced in the statement of facts—except certain correspondence offered by the defendant and excluded by the court, but which was incorporated in the bills of exception and embraced in the record—which was therefore complete; and that such correspondence thus copied in the bills of exception on the first trial was admitted in evidence on the second and third trials, in accordance with the opinion of this court on the first appeal. (204 S. W. 241, 243; S. F. pp. 86, 80.)

It also appears that the statement of facts on the first trial was, by agreement, used on the second and third trials, excepted that plaintiff insisted that Mr. Alexander's depositions be taken, it being impracticable for him to come from Nashville to Waco again. It also appears that all such documents were delivered to the Court, or to the court reporter, and that Mr. Alexander did not have them when he testified by deposition, except as he may have had duplicates in his own office. This fully appears as follows:

On January 13, 1917, defendant's attorney wrote the following [fol. 167] letter to Mr. Alexander:

"Mr. H. B. Alexander, Manager,  
824 Stahlman Building,  
Nashville, Tennessee.

DEAR SIR:

I have your favor of the 11th instant. I also expect Mr. Bidwell to be present at the trial. Please bring with you all original contracts between the Company and yourself and the firm of Burbank & Alexander; also all general and special instructions showing your authority, and all correspondence and other papers about any Dunken policies, either with Dunken or with the Company, or with anybody else, from the beginning.

Please also have with you the official publication containing the Tennessee Statute on the subject of life insurance, attorney's fees, etc., of which you sent me copies some time ago. Please report to me promptly when you reach Dallas, and oblige." (S. F. pp. 86-87.)

On the same day the defendant's attorney sent the following telegram to Mr. Bidwell:

"F. W. Bidwell,

Care Aetna Life Insurance Company,  
Hartford, Conn.:

Your letter 9th received. Dunken case set specially for 22nd. I desire your presence. Meet me in Dallas not later than 20th. Bring all original contracts with Alexander and Burbank & Alexander, also all general and special instructions showing their authority, and all correspondence and other papers about any Dunken policies from beginning. I have also asked Alexander to come. Am ariting." (S. F. p. 99.)

Mr. Alexander testified, by deposition, as follows:

"Prior to the institution of this suit I furnished to Forrester & Stanford, attorneys for plaintiff, all the correspondence that I had, so far as I recall it, pertaining to this case. I testified in person on the former trial of this case, at Waco, Texas, and I produced all correspondence and other papers that I had at my command referring in any way to Mr. Dunken's insurance policies, and so far as I know all such papers were submitted to plaintiff's attorneys for examination. (S. F. p. 99.)

Mr. Alexander also testified as follows:

"I did have some correspondence with Mr. Dunken about the life insurance involved in this litigation, but all of the correspondence [fol. 168] that I had copies of was turned over—as I recall it—to the Court on the first trial of this case at Waco, Texas. I have furnished the originals or copies of all correspondence that I had. There were a number of notices sent to Mr. Dunken in regard to the payment of his premiums, and perhaps some letters that were written by me in person that I had no copies of. All correspondence that I had, as stated above, was furnished to the court, and I have none in my possession at present." (S. F. p. 96.)

Mr. Alexander also testified as follows:

"W. J. Dunken was notified that his note for \$106.45, dated February 26, 1916, was due, as stated in the note, and as to what correspondence was had directly on this will be shown by the letters and correspondence as filed with the Court in this case, provided I kept copies of such correspondence. But as stated above most of the notices of extension and premiums were sent out on printed forms, of which no copies were kept. \* \* \* I wrote Mr. Dunken on March 4, 1916, enclosing his new policy No. 152,775, as stated in my letter, and presume all of the conditions as to the delivery of said policy are stated in the letter, of which I kept no copy, but same was furnished to the court, and is now on file there (S. F. pp. 48-48-101).

"Yes, W. J. Dunken was notified that his note for \$106.45 dated February 26, 1916, was due as stated in the note, and as to what correspondence was had directly on this will be shown by the letter and

correspondence as filed with the Court in this case, provided I kept copies of such correspondence. But, as stated above, most of the notices of extension notes and premiums were sent on printed forms of which no copies were kept." (S. F. p. 101.)

Mr. Alexander also testified as follows:

"I have every reason to believe that the enclosures were actually enclosed with my letter of March 4, 1916. They were sent out by the cashier of the Company's agency at Nashville, under my direction, I did not receive any answer whatever to said letter, nor did Mr. Dunken ever pay or offer to pay, in whole or in part, any of the sums mentioned in said letter, and he did not return to me any instruments [fol. 169] mentioned in said letter. I do not remember having written any personal letters to Mr. Dunken after March 4, 1916, but I constantly reminded my office force in regard to the necessity of Mr. Dunken taking action immediately. Most of such notices were usually sent out on printed forms, and no copies kept. But I can't say positively in this case as to what notices or communications were sent to Mr. Dunken, but there were some changes of importance being made in my office at that time, which caused quite a disturbance of our office force and work." (S. F. pp. 97-98.)

W. J. Moroney, attorney for defendant, testified as follows:

"I have already been sworn as a witness, and simply want to make this statement: that I have gone through carefully all the papers brought here by Mr. Alexander from the Nashville office, and all papers brought here by Mr. Bidwell from the Home Office, and I have offered in evidence everything I could find in any of these papers, letters, correspondence and other documents, in any way referring to the Dunken insurance policies, or the authority of Mr. Alexander as agent of the Company, except that I have mislaid one or two of the copies of letters that were offered in evidence on the former trial, and in lieu of them I have offered copies contained in the bills of exception taken on the former trial." (S. F. pp. 115-116.)

Mr. J. A. Stanford, attorney for plaintiff, testified as follows:

"I just want to state that soon after the death of Mr. Dunken, Mrs. Dunken sent to the office of Forrester & Stanford, Policy No. 152775, and quite a lot of letters, and one or two telegrams, premium receipts, notices of premiums, etc., and various papers pertaining to this insurance, and I have produced in court here every written or printed document of any kind, and every kind, that was sent to our office pertaining to this insurance." (S. F. p. 116.)

By agreement the statement of facts, etc., of the former trials were used in evidence on the last trial, except that there was no agreement to reduce the former testimony of Alexander, and it therefore became necessary to take his deposition. (S. F. p. 6.)



[fol. 170] Defendant's attorney, in sending papers to Mr. Alexander to have his deposition taken, sent him the following letter:

"Dallas, Texas, January 2, 1919.

Mr. H. B. Alexander,  
Nashville, Tenn.

DEAR SIR:

In *Dunken v. Aetna Life Insurance Company*, pending at Waco, I enclose papers to take your depositions, as follows:

1. Direct and cross-interrogatories, with waiver of commission, etc.
2. Printed form of instructions to Notary.
3. Envelope in which to return deposition, all blanks to be carefully filled.

Please select a thoroughly competent and experienced Notary, and see to it, if you are able to do so, that clear, direct and complete answers are given to all questions. If for any reason you are unable to answer any of said questions fully state why you can not do so.

Since I prepared the direct interrogatories it has occurred to me that all, or nearly all, of the papers referred to were turned over by you at the former trial. I have not gone thru my files to learn what papers I have. If you are unable to attach the original papers, or copies of papers, you should state in your answers why you can not do so.

Please pay the Notary fee. The Notary should attach to his certificate showing that this fee was paid by defendant.

Please mail me a carbon copy of your answers to the interrogatories for my files, and complete the deposition as promptly as practicable consistent with due care.

As you are required to return this original letter with depositions, I enclose a carbon copy for your filed." (S. F. pp. 80-81.)

It does not appear from the record that any objection was made to the deposition of Mr. Alexander on account of any of his answers being incomplete or "evasive;" and it clearly appears, by reasonable interpretation, that he furnished a copy of the only formal report he made referring in any way to the *Dunken* insurance, properly omit- [fol. 171] ting copies of reports on other matters. (S. F. pp. 46-47.) And it clearly appears that everything he reported, and every scrap of documentary evidence referring to the *Dunken* insurance in the office of Alexander or at the Home Office was actually produced on the first trial, and embraced in the record, so far as either party deemed it material, and which record was admitted in evidence on the last trial so far as either party deemed it material.

It also appears that on the first trial Mr. Alexander, from the Nashville office, and Mr. Bidwell, from the Home Office, testified in person, when they were subject to direct and cross-examination in open court, with all documents present, and there is nothing in the record

indicating in the slightest degree that either witness failed to answer with the utmost candor.

In order to eliminate all uncertainty and occasion for further inquiry, and in view of what has been stated, the following agreement was made in open court:

"It is admitted that the record shows that the letter of March 4, 1917, was the end of the correspondence between Dunken and the defendant Company or its agents, and that Dunken received no further notice from the Company." (S. F. p. 33.)

It was agreed on the trial that the note maturing March 29, 1916, was not paid, whereupon, by the express terms of the note and policy, the original policy lapsed. (S. F. pp. 42-46.) The following agreements were also made on the trial:

"It is agreed by and between attorneys for both sides that copies of letters and other documentary evidence may be offered in evidence in this case, without the necessity of proving their execution, and that either a copy or the original of any such documentary evidence may be introduced without proof of their execution;

It is further agreed, for the purpose of the record, that either side may read excerpts from the statement of facts made of the former trials of this case, without the necessity of further proving them up." (S. F. p. 6.)

[fol. 172] It is admitted by defendant that the letter dated March 4, 1916, together with enclosures contained in it, and that Policy 152775 and loan papers, were all found in Dunken's iron safe after his death, where he kept his other valuable papers, and had been there from the time he received them. (Exhibit 26, p. 32 of this S. F.) (S. F. p. 42.)

It also appears by the record that the Insurance Company sent to Mr. Alexander a form of "blanket receipt," for premiums on the new policy to January 28, 1916 (the new policy having been dated back to January 28, 1911), and also a form of receipt for the annual premium on the new policy, due in advance, on January 28, 1916; and these receipts were charged by the Company to Mr. Alexander; and credited to him when they were returned unpaid, one on April 28, 1916, and the other on May 10, 1916, the difference in date being explained by the correspondence with Mr. Wright, showing that these forms of receipt were returned for credit on the respective dates that they were found in Mr. Alexander's office. (S. F. pp. 84, 85, 86, 87, 88.) It thus appears by every act of the Company shown by the record that the Company treated the entire insurance as lapsed and of no further force and effect from the time the Home Office first learned that the contract had not been completed, and incurring the time when said Court, according to its opinion, merely surmise without any evidence, and directly against the plain and uncontradicted evidence, that the Company may possibly have treated the insurance as still in full force and effect.

*Second Assignment of Error*

The Court of Civil Appeals erred in overruling and not sustaining appellant's eleventh assignment of error (Tr. p. 43, Br. p. 27), excepting to the judgment of the trial court on the following grounds:

"To the judgment for damages and attorney's fees, because (1) plaintiff not having recovered the full amount sued for, the statute is not applicable in any event; and (2) because the evidence conclusively shows that said policy, even if it is a completed contract, is not a Texas contract, or governed by the Texas statutes authorizing a recovery of damages and attorney's fees as therein provided; that said alleged policy is governed by the law of the State of Tennessee [fol. 173] (or if not, it is governed by the laws of the State of Connecticut); that under the laws of Tennessee and Connecticut, no damages, penalty or attorney's fees can be recovered under the facts of this case; and that to construe said Texas statute as applying to said policy would be in violation of the Constitution of the United States, and especially of Article I, Section X, prohibiting the passage of any law impairing the obligations of contracts, and of Article 40, Section I, providing that full faith and credit shall be given in each State of the public acts, records and judicial proceedings of every other State, and of Section 1, of the Fourteenth Article of Amendment, providing that no State shall make or enforce any law that shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

The only allegation of a statutory demand made by plaintiff is contained in her petition (Tr. p. 7), alleging that she had demanded \$10,000.00, the full face of the policy.

The only evidence of any demand is an agreement embraced in the statement of facts, p. 6, as follows:

"It is further agreed, that proof of death of the deceased was waived by the defendant Insurance Company, and that the necessary statutory demand in order to entitle the plaintiff to twelve per cent damages, and to reasonable attorney's fees, was made by the plaintiff provided, under other facts in this case, the plaintiff is entitled to recover such penalty."

Under the "other facts in this case," plaintiff actually recovered judgment for the principal sum of only \$8,700.00 (Tr. p. 39). It is not now even contended that she was entitled to more.

The original policy, negotiated, executed and delivered in Tennessee, where the insured then resided, was of course a Tennessee contract. The second or "converted" policy, on which judgment was rendered, was merely an inchoate substitution for the original contract, under an option originally provided for, and not in any sense a new and independent contract. If ever delivered at all, in a legal sense, it was delivered in Tennessee when it was mailed at

Nashville. Nobody in Texas representing the Company had any connection whatever with the transaction. It is indisputably established by proper pleading and evidence that under the laws of Tennessee and Connecticut no damages or attorney's fees are recoverable under the facts of this case.

### *Argument*

Extended argument in support of this application will not be attempted here. However, reference is made to petitioner's argument in amended motion for rehearing, beginning on p. 8.

Merely for the purpose of granting a writ of error, it seems sufficient to consider only the question of statutory damages and attorney's fees, the plain conflict of decisions on that subject, and, in addition, the Federal questions presented by the present record.

If, as apparently suggested by the Court of Civil Appeals, the fact that the Company was doing business in Texas converts a Tennessee contract into a Texas contract, then all contracts made by the Company anywhere and everywhere are Texas contracts, if they come before the Texas courts. There is in this case no question of presumption, because the statute law of Tennessee and Connecticut was pleaded and proved by defendant, and is not in controversy in this case.

Petitioner, duly complaining of the judgment and orders of the Court of Civil Appeals, and of said Mrs. Pearl Stone Dunken, Administratrix, respectfully prays that a writ of error be granted to review the judgment, orders and opinion of the Court of Civil Appeals, and to reverse said judgment, and to grant to petitioner such other relief as it may be entitled to.

Mr. W. E. Spell and Mr. J. A. Stanford, who reside at Waco, Texas, are attorneys of record for defendant in error.

Respectfully submitted, (Signed) W. J. Moroney, Attorney  
for Aetna Life Insurance Company, Plaintiff in Error,  
Dallas, Texas.

[fol. 175] [File endorsement omitted.]

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above and foregoing twenty-one pages contain a true and correct copy of the original application for writ of error, together with the endorsements thereon, in the case of The Aetna Life Insurance Company, *fo* Hartford, Connecticut, vs. Mrs. Pearl Stone Dunken, Administratrix, said original application now being on file in this office.

Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this the 16th day of April, A. D. 1923.

F. T. Connerly, Clerk, Supreme Court of Texas. (Seal.)

[File endorsement omitted.]

## IN SUPREME COURT OF TEXAS

[Title omitted]

From McLennan County, Third District

ORDER DISMISSING PETITION FOR WRIT OF ERROR—Filed in Court of  
Civil Appeals Mar. 26, 1923

February 28th, 1923.

This day came on to be heard the application of plaintiff in error for a writ of error to the Court of Civil Appeals for the Third District and the same having been duly considered, it is ordered that said application be dismissed for want of jurisdiction; That the applicant, Aetna Life Ins. Co. of Hartford, Conn., and surety, The Aetna Casualty & Surety Co., pay all costs incurred on this application.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby [fol. 176] certify that the above is a true and correct copy of the judgment rendered by the Supreme Court on the application for writ of error in the above styled cause.

Witness my hand and the seal of said Court, this the 24th day of  
Mch. A. D. 1923.

F. T. Connerly, Clerk, By B., Deputy. (Seal.)

[File endorsement omitted.]

## IN SUPREME COURT OF TEXAS

[Title omitted]

In Error to the Court of Civil Appeals, Third Supreme Judicial  
District of Texas, at Austin

MOTION FOR REHEARING OF APPLICATION FOR WRIT OF ERROR—  
Filed in Supreme Court of Texas, Mar. 14, 1923; Filed in Court  
of Civil Appeals Apr. 16, 1923

To the Supreme Court of Texas:

Now comes petitioner, The Aetna Life Insurance Company of Hartford, Connecticut, applicant for a writ of error, and respectfully prays that the order of this Court dismissing its application for a writ of error for want of jurisdiction be set aside, and that said application be granted, for the reasons herein stated, in addition to the reasons stated in said original application.



Applicant is in doubt as to the proper practice on this motion, and as to why said application was "dismissed for want of jurisdiction", when applicant conceives that all the questions presented in said application are within the jurisdiction of this Court? Under R. S. Article 1521, subdivision 6, a degree of discretion is granted to this Court; but, as applicant respectfully submits, the exercise of discretion is the exercise of jurisdiction, not a refusal to take jurisdiction, which implies a want of authority to hear and determine the matter presented. Such appears to be the view of the United States [fol. 177] Supreme Court on application for writs of certiorari, which, under the Federal Judicial Code, differ only in form from application for writs of error under said subdivision 6. When the United States Supreme Court has discretionary authority it either grants or denies a petition for a writ of certiorari, but never dismisses if for want of jurisdiction except when it has no authority to consider it. (See any number of memorandum cases in back of any recent volume of United States Supreme Court Reports).

But said application is based on several grounds involving no matter of discretion, and clearly within the jurisdiction of this Court. For example, the application squarely involves the construction of a statute, and its validity under the Federal Constitution as applied in this case. Applicant is admonished that a motion for rehearing should be concise, and not embrace unnecessary repetition of matters embraced in the application. Therefore applicant will not stop to give further illustration, except to say that the application presents questions arising under subdivisions 1, 2, 3, 5 and 6 of said Article 1521.

An order erroneously dismissing an application for want of jurisdiction may be corrected, and on rehearing the application may be either granted or denied, *Walker v. Ward*, 183, S. W. 1144; Supreme Court Rule 4.

In addition to what was presented in said application (as provided in Rule 4 of this Court) applicant submits as follows:

1. The Judgment in this case against the Aetna Life Insurance Company on an alleged contract that never existed as a contract, or went into effect, is in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, providing in substance that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Applicant prays for a writ of error to correct the error of the Court of Civil Appeals in affirming said judgment.

2. The Supreme Court erred in not granting said application for a writ of error for the reasons stated in applicant's second assignment [fol. 178] of error, which for the convenience of the Court is here quoted in full, as follows:

"The Court of Civil Appeals erred in overruling and not sustaining appellant's eleventh assignment of error (Tr. p. 43, Br. p. 27), excepting to the judgment of the trial court on the following grounds:

To the judgment for damages and attorney's fees, because (1) plain—not having recovered the full amount sued for, the statute is not applicable in any event; and (2) because the evidence conclusively shows that said policy, even if it is a completed contract, is not a Texas contract, or governed by the Texas statutes authorizing a recovery of damages and attorney's fees as therein provided; that said alleged policy is governed by the law of the State of Tennessee (or if not, it is governed by the law of the State of Connecticut); that under the laws of Tennessee and Connecticut no damages, penalty or attorney's fee can be recovered under the facts of this case; and that to construe said Texas statute as applying to said policy would be in violation of the Constitution of the United States, and especially of Article I, Section X, prohibiting the passage of any law impairing the obligations of contracts, and of Article 40, Section I, providing that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other state, and of Section 1, of the Fourteenth Article of Amendment, providing that no State shall make or enforce any law that shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

### *Argument*

The facts are sufficiently stated in said original application, but by way of argument reference will be made to the record where it seems probable that it may have been misunderstood.

While it is earnestly submitted that each and every part of the judgment against applicant violates its constitutional rights, to make [fol. 179] that matter plain in this motion would require a substantial repetition of the original application. This argument will therefore be confined to the question of statutory damages and attorney's fees, where the error is plain when the record is understood.

Shortly stated, the judgment for *atutory* damages and attorney's fees is objected to on two general grounds; first, because the Texas statute has no application where plaintiff is not entitled to recover and fails to recover the amount demanded; and second, because the alleged contract, if a contract at all, is not a Texas contract, and is not governed by said Texas statute. These two branches of the subject will be discussed separately.

1. Applicant had no notice of the reply to its application until after this court had acted, when applicant discovered said reply among the papers. Assuming that this Court probably considered said reply, brief reference will be made to it.

That there is a plain conflict between the Courts of Civil Appeals on this subject, needs no argument. The conflict is recognized by this Court in *Manhattan Life Insurance Company v. Stubbs*, 234 S. W. 1099, 1105, although it was held that the *Stubbs* case did not

présent the question because plaintiff was entitled to recover—and finally recovered—the full amount demanded and sued for.

Likewise defendant in error, in reply to said application, undertakes to distinguish this case on the ground that plaintiff did not sue for the full face of the policy unconditionally, but for the face of the policy "less any indebtedness, if any, on this policy". This correctly states plaintiff's petition,—with the additional observation that no indebtedness against the policy was admitted, although there was an undisputed indebtedness of \$1,300.00 (if the policy was in force), thus reducing the principal sum from \$10,000.00 to \$8,700.00.

Applicant infers that this Court may have inadvertently adopted the distinction thus sought to be drawn, although it completely mistakes the real ground of appellant's objection. However plaintiff's [fol. 180] petition, or her prayer for relief, may have been drawn, the record shows conclusively that her demand—which was a condition precedent to her right to recover any damages or attorney's fees at all—was for \$10,000.00, or unconditionally for \$1,300.00 more than she was entitled to demand under her own admission.

The statute (R. S. Art. 4746) reads as follows:

"In all cases where a loss occurs and the life insurance company, or accident insurance company, or life and accident, health and accident insurance company liable therefor shall fail to pay the same within thirty days after demand therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent damages on the amount of such loss together with reasonable attorney fees for the prosecution and collection of such loss."

The only allegation in plaintiff's pleadings on the subject of a demand is paragraph 9 of her petition (Tr. p. 7), reading as follows:

"Plaintiff would further represent and show to the court that, notwithstanding, the defendant became bound and obligated to pay to the Administratrix of the estate of W. J. Dunken, deceased, said sum of \$10,000.00, as above set out, and notwithstanding, plaintiff has made demand upon defendant for the payment of said amount, yet plaintiff says that Defendant has wholly failed and refused to pay the same, although long since due and payable, and that by reason of Defendant's failure and refusal to pay the same, although long since due and payable, and that by reason of defendant's failure and refusal to pay said amount, plaintiff has been compelled to employ attorneys to bring suit to enforce the payment of said amount, by reason of which the defendant became liable to Plaintiff for 12% of the amount of said policy as damages and reasonable attorney's fees in the sum of \$3,000.00."

The only evidence of any demand is an agreement embraced in the statement of facts, p. 6, as follows:

"It is further agreed that proof of death of the deceased was [fol. 181] waived by the defendant Insurance company, and that the necessary statutory demand in order to entitle the plaintiff to

twelve per cent damages, and to reasonable attorney's fees, was made by the plaintiff provided, under other facts in this case, the plaintiff is entitled to recover such penalty."

Under the "other facts in this case," plaintiff actually recovered judgment for the principal sum of only \$8,700.00 (Tr. p. 39). It is now now even contended that she was entitled to more.

It is not deemed necessary to cite authorities in support of the proposition that a plaintiff is not entitled to recover judgment on a cause of action not either pleaded or proved. This objection is clearly made by our assignment of error, but such a judgment is fundamentally erroneous, and subject to review even in the absence of an assignment.

In order to recover damages and attorney's fees the facts authorizing such recovery must be alleged and proved. It is unequivocally alleged that the demand was for \$10,000.00, absolutely and unconditionally,—not \$10,000.00 "less any indebtedness, if any, on this policy." Therefore it is not necessary to inquire whether a qualified or uncertain demand would be sufficient, although we think plainly that it would not be sufficient under the rules governing the right to recover penalties.

It is wholly immaterial that no tender was alleged and proved. This was directly held in *American National Ins. Co. v. Collins*, 149 S. W. 554, citing previous decisions, and from which we quote as follows:

"The decisions in this state have settled the proposition that, in order to recover the penalty and attorney's fee for failure to pay a life insurance policy, demand must be made prior to the filing of suit, although it may appear that such demand would have been ineffectual, and that payment would have been refused. *Insurance Co. v. Ford*, 130 S. W. 769; *Insurance Co. v. Ford*, 131 S. W. 406; *Insurance Co. v. Sturdevant*, 59 S. W. 61. The reason for [fol. 182] this is that the right to recover the penalty and attorney's fee does not rest upon contract, nor the right to recover damages for tort, but is strictly statutory; and therefore, in order to recover, the terms of the statute must be strictly complied with. *Schloss v. Railway Co.*, 85 Tex. 601, 22 S. W. 1014."

The decision in *American National Ins. Co. v. Turner*, 226 S. W. 487, is concisely stated in the head-note as follows:

"Where the beneficiary under a life insurance policy makes demand on the insurer for the face amount of the policy, which is larger than the amount due, and recovers a less amount by suit, the insurance company is not liable to her for attorney's fees under Rev. St. 1911, Art. 4746."

These cases, directly in point, are decisive, unless they are to be overruled. Even if the Supreme Court is inclined to disagree with them a writ of error should be granted to review the question.

2. But our objections to the judgment for damages and attorney's fees rest also on fundamental grounds independent of what has already been presented.

(a) If the policy on which a judgment was rendered is a completed contract at all it is a Tennessee contract, completed when it was delivered to the post office at Nashville. On this point we find no conflict in the decisions where the point was seriously considered. Therefore, aside from all other considerations, this is a Tennessee contract, whose validity, construction and obligation must be governed by the laws of Tennessee (which were pleaded and proved), even if the original term policy—admittedly a Tennessee contract—is ignored. *Northwestern Mut. Life Ins. Co. v. McCue*, 223 U. S. 234; 13 Corpus Juris 248; *Joyce on Insurance*, Section 1931.

It is undisputed and indisputable that if this is a Tennessee contract no damages or attorney's fees can be recovered.

(b) But the objection goes much deeper. Of course it will be admitted without argument that the original term policy was a Tennessee contract, negotiated and delivered in Tennessee, where [fol. 183] the insured then resided. *Northwestern Mut. Life Ins. Co. v. McCue*, 223 U. S. 234; and cases there cited. The second policy, on which judgment was rendered, was not a new contract in any correct sense. It was nothing but the original contract in an advanced stage of performance, or attempted performance, without the slightest change in consideration or terms except as expressly provided for in the original contract. Therefore it is a Tennessee contract, if a contract at all, even if it appeared (which it does not) that all the negotiations etc. about the new contract were conducted in Texas by licensed Texas agents of the Company.

This proposition is abundantly sustained by a long line of decisions under R. S. Art. 1318, penalizing foreign corporations doing business in Texas without obtaining a permit as provided by law. It is now established that this statute has no application to acts in performance or adjustment of contracts not originally made in Texas, even if supplemental contracts are made in Texas for such purpose. There is neither time nor space now to collect the decisions to this effect, but many of them are cited in the notes under said Article. To hold otherwise would make said Article unconstitutional under the contract clause of the Federal Constitution.

3. The Court of Civil Appeals appears to rest its decision on this point mainly, if not wholly, on the admitted fact that the Insurance Company is doing business in Texas under license. Under this doctrine the Texas statute can be applied to policies issued anywhere and everywhere, and a general invitation is issued to the world to sue in Texas and reap the bounty of our statutes. Of course a suit on a policy is a transitory action which may be brought wherever service may be had.

Will the Supreme Court of Texas permit this decision, or dictum—if it is a dictum—to stand without comment or correction?

Applicant respectfully prays that the order dismissing its appli-



cation for want of jurisdiction be set aside, and that said application be granted.

[fol. 184] (Signed) W. J. Moroney, Attorney for Aetna Life Insurance Company, Dallas, Texas.

Copy mailed to opposing counsel.

[File endorsement omitted.]

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above and foregoing five pages contain a true and correct copy of the original motion for rehearing of application for writ of error, together with the endorsements thereon, in the case of The Aetna Life Insurance Company, of Hartford, Connecticut, Plaintiff in Error, vs. Mrs. Pearl Stone Dunken, Administratrix, Defendant in Error, said original motion now being on file in this office.

Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this the 16th day of April, A. D. 1923.

F. T. Connerly, Clerk Supreme Court of Texas. (Seal.)

[File endorsement omitted.]

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IN SUPREME COURT OF TEXAS

[Title omitted]

(From McLennan County, 3rd District)

ORDER OVERRULING MOTION FOR REHEARING—Filed in Court of Civil Appeals, Apr. 16, 1923; Filed in Supreme Court

For rehearing of App. No. 12874. Overruled.

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the order overruling motion for rehearing of App. No. 12874, Aetna Life Insurance Co. vs. Mrs. P. S. Dunken, Admr., as the same appears of record in the minutes of the Supreme Court, at page 2, under date of March 21st, 1923.

Witness my hand and the seal of the Supreme Court of Texas, at the City of Austin, this the 16th day of April, A. D. 1923.

F. T. Connerly, Clerk Supreme Court of Texas. (Seal.)

[File endorsement omitted.]

## SUPREME COURT

[Title omitted]

Clerk's Office, Supreme Court

## BILL OF COSTS

Filing Application .....	.50
Docketing Petition .....	.50
Entering Appearance of Counsel.....	.50
Filing Two Briefs .....	.60
Filing Three Papers.....	1.80
Entering Orders .....	1.00
Entering Judgment on Application.....	1.00
Certified Copy of Judgment.....	1.00
Taxing Cost of Application.....	.50
Certified Copy Bill of Costs.....	1.00
Filing and Entering Motion.....	.55
Notice to Counsel.....	2.00
Total .....	\$10.95

I, F. T. Connerly, Clerk of the Supreme Court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

Witness my hand and seal of said Court, at Austin, this the 24th day of March, 1923.

F. T. Connerly, Clerk. (Seal.)

(Endorsement on back:) Application No. 12874. Certified copy bill of costs in Supreme Court Austin. Aetna Life Ins. Co. etc. vs. Mrs. Pearl S. Dunken. Filed in Court of Civil Appeals 3rd Supreme Judicial District Austin Texas, March 26th, 1923. R. H. Connerly, Clerk.

[fol. 186] IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

No. 6492

[Title omitted]

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME—Filed in Court of Civil Appeals Apr. 16, 1923

To any justice of the Supreme Court of the United States or the Chief Justice of the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas:

Petitioner, the Aetna Life Insurance Company of Hartford, Connecticut, and Aetna Casualty and Surety Company, respectfully

represent that on or about the 8th day of September 1916, Mrs. Pearl Stone Dunken commenced a suit in the District Court of McLennan County, Texas, in and for the Nineteenth Judicial District, against said Aetna Life Insurance Company, for the recovery in the alternative of the amounts of two alleged life insurance policies, alleged to have been issued by said Aetna Life Insurance Company on the life of W. J. Dunken, Deceased; and afterwards, in response to process, said Aetna Life Insurance Company appeared and interposed, among others, the defenses hereinafter mentioned to said action; and after two trials and judgments and reversals on appeal, said cause again came on for trial, and in due course judgment was rendered by said District Court in favor of plaintiff for to wit \$15,310.50, with legal interest from June 1, 1921, and costs of suit. From the judgment so rendered by said District Court said Aetna Life Insurance Company appealed to the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas, where the said cause was numbered and entitled as above; and afterwards, on to wit the 15th day of November, 1922, said Court of Civil Appeals rendered judgment affirming said judgment of the District Court; and that the appellee, Mrs. Pearl Stone Dunken, Administratrix of the Estate of W. J. Dunken, deceased, do have and recover of and from the appellant, the Aetna Life Insurance Company of Hartford, Connecticut, principal, and its surety, Aetna Casualty and Surety Company, the amount adjudged by the Court below, and all costs in this behalf expended. After-[fol. 187] wards and in due time said Aetna Life Insurance Company filed in said Court of Civil Appeals its motion for rehearing in said cause, which was thereafter, to wit on the 17th day of January, 1923, by said Court overruled and denied. Thereafter and in due time said Aetna Life Insurance Company applied in due form, and as authorized by law, to the Supreme Court of the State of Texas, for a writ of error in said cause to said Court of Civil Appeals, upon the grounds, among others, hereinafter mentioned, which application was thereafter, to wit, on February 28, 1923, dismissed for want of jurisdiction, under the discretionary authority of said Supreme Court of the State of Texas, as petitioners are advised, to grant, deny or dismiss for want of jurisdiction an application for want of error; that afterwards and in due time said Aetna Life Insurance Company filed in said Supreme Court of the State of Texas its motion for rehearing, which motion was entertained by said Court, and overruled on to wit the 21st day of March, 1923; whereupon the said judgment of the said Court of Civil Appeals, which is the highest court of the State of Texas in which a decision in said suit could be had, became and is now final.

Petitioners say that they are aggrieved by the said judgment of the Court of Civil Appeals, and the proceedings in said suit, and that in the said judgment and proceedings had prior thereto in said cause, errors were committed to the prejudice of petitioners, because they say there was in said suit drawn in question the validity of a statute and an authority exercised under the authority of the United States, and the decision in said suit was against their validity, and there was drawn in question the validity of a statute, or Constitution, of,

or an authority exercised under a State on the ground of their being repugnant to the Constitution or Laws of the United States, and the decision in said suit was in favor of their validity; and that titles, rights, privileges and immunities were in said suit claimed by petitioners under the Constitution and statutes of, and commissions held, and authority exercised under the United States, and the decision in said suit was against the titles, rights, privileges and immunities specially set up and claimed therein by petitioners under such Con- [fol. 188] stitution, statutes, commissions and authority, as will hereinafter more fully appear; and because this suit involves the validity of a contract; and such affirmance is based on a change in the rule of law or construction of statutes by the highest Court in the State of Texas applicable to such contract, in violation of the Constitution of the United States, and especially of Article 1, Section 10, prohibiting the passage of any law impairing the obligation of contracts, and of Article 40, Section 10, providing that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other State, and of Section 1 of the Fourteenth Article of Amendment, providing that no State shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

Petitioners say that said judgment included a judgment for statutory damages and attorney's fees, under a Texas statute, which statute had no application, as petitioners submit, to the alleged contract upon which judgment was rendered, because such alleged contract—if a contract at all—was not a Texas contract, it being conclusively established by the evidence that the policy upon which plaintiff recovered was signed in the State of Connecticut, and delivered, if delivered at all, in the State of Tennessee; that any obligation of defendant was performable in the State of Connecticut; that there is no law in either Tennessee or Connecticut authorizing the recovery of attorney's fees or damages, such as were recovered in this case; and if the Texas statute on that subject is construed as applying to said policy, said statute as thus construed is in violation of the Constitution of the United States, because (1) as thus construed it would impair the obligations of said contract, (2) as thus construed it would deprive the defendant of its property without due process of law; and (3) as thus construed it would deprive the defendant of the equal protection of the law.

[fol. 189] It was further contended by petitioners that the judgment in this case on an alleged contract that never existed as a contract, or went into effect, is in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, providing in substance that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

Petitioners further say that each of the rulings above mentioned and complained of, with others, were duly assigned as error in, and were urged as grounds for, the application made as aforesaid to the

Supreme Court of Texas for a writ of error in said cause in said Court of Civil Appeals.

Petitioners refer to the record of said cause, as filed in said Court of Civil Appeals, for further and more complete statement of the rulings and proceedings complained of, and the fact upon which they specially set up and claim their rights under the Constitution and statutes of the United States.

Petitioners refer to the assignment of errors filed herewith, and pray that the same be considered for the purposes of this application, as a part hereof, and further pray that a writ of error may be allowed and issued herein to the said Court of Civil Appeals in and for the Third Supreme Judicial District of Texas, which now has the record in said cause, unto the Supreme Court of the United States, to the end that the errors in said judgment, and the proceedings in said cause, may be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, and that the transcript of the record, proceedings and papers in said cause may be sent to the Supreme Court of the United States.

W. J. Moroney, Attorney for Aetna Life Insurance Company of Hartford, Connecticut, and Aetna Casualty and Surety Company.

Allowed this 16 day of April, 1923.

W. M. Key, Chief Justice of the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas.

[fol. 190] [File endorsement omitted.]

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IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

No. 6492

[Title omitted]

From Nineteenth Judicial District Court, McLennan County, Texas

ASSIGNMENTS OF ERROR—Filed Apr. 16, 1923

Now come plaintiffs in error, the Aetna Life Insurance Company, of Hartford, Connecticut, and the Aetna Casualty and Surety Company, and on writ of error, from the Supreme Court of the United States, say that in the record and proceedings in said cause, there is manifest error, which they assign as follows:

First

The Court of Civil Appeals erred in overruling and refusing to sustain plaintiffs in error's original assignment of error No. 11 (*f*), obiecting and excepting to the judgment of the trial court, as follows:



"To the judgment for damages and attorney's fees, because (1) plaintiff not having recovered the full amount sued for, the statute is not applicable in any event; and (2) because the evidence conclusively shows that said policy, even if it is a completed contract, is not a Texas contract, or governed by the Texas statutes authorizing the recovery of damages and attorney's fees as therein provided; that said alleged policy is governed by the laws of the State of Tennessee (or if not, it is governed by the laws of the State of Connecticut); that under the laws of Tennessee and Connecticut no damages, penalty or attorney's fees can be recovered under the facts of this case, [fol. 191] and that to construe said Texas statutes as applying to said policy would be in violation of the Constitution of the United States, and especially of Article I, Section 10, prohibiting the passage of any law impairing the obligation of contracts, and of Article 40, Section 1, providing that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and of Section 1 of the Fourteenth Article of Amendment, providing that no State shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

### Second

The Court of Civil Appeals erred in overruling and refusing to sustain plaintiffs in error's original assignment of error No. 11 (e), excepting and objecting to the judgment in favor of plaintiff against defendant, for any amount, because said judgment is in violation of the Constitution of the United States, and especially of Article 1, Section 10, prohibiting the passage of any law impairing the obligation of contracts, and of Article 40, Section 1, providing that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and of Section 1 of the Fourteenth Article of Amendment, providing that no State shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

### Third

The Court of Civil Appeals erred in affirming the judgment of the trial court, because this suit involves the validity of a contract, and such affirmance is based on a change in the rule of law or construction of statutes by the highest Court of the State of Texas applicable to such contract, in violation of the constitution of the United States, [fol. 192] and especially of Article 1, Section 10, prohibiting the passage of any law impairing the obligation of contracts, and Article 40, Section 10, providing that full faith and credit shall be

given in each State to the public acts, records and judicial proceedings of every other State, and of Section 1 of the Fourteenth Article of Amendment, providing that no State shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

#### Fourth

The Court of Civil Appeals erred in deciding against the titles, rights, privileges and immunities specially set up and claimed by the Aetna Life Insurance Company under the Constitution and statutes of, and commission held, under the authority of the United States.

#### Fifth

The Court of Civil Appeals erred in affirming the judgment of the trial court, and in not reversing and rendering said judgment in favor of said Aetna Life Insurance Company.

Wherefore said plaintiffs in error each pray that the judgment of said court of Civil Appeals be reversed, and said cause remanded, and for such further proceedings as law and justice may require.

W. J. Moroney, Attorney for the Aetna Life Insurance Company of Hartford, Connecticut, and Aetna Casualty and Surety Company, Plaintiff in Error.

[File endorsement omitted.]

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IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

No. 6492

[fol. 193] THE AETNA LIFE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Appellant,

v.

Mrs. PEARL STONE DUNKEN, Administratrix, Appellee.

BOND ON WRIT OF ERROR FROM UNITED STATES SUPREME COURT—  
Filed Apr. 16, 1923

Know all men by these presents:

That we, the Aetna Life Insurance Company, of Hartford, Connecticut, and Aetna Casualty and Surety Company, as principals, and the Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Mrs. Pearl Stone Dunken,

Administratrix of the Estate of W. J. Dunken, deceased, in the full and just sum of Twenty-five Thousand Dollars (\$25,000.00) to be paid to the said Mrs. Pearl Stone Dunken, Administratrix, of the estate of W. J. Dunken, deceased, her heirs, executors or assigns, for which payment well and truly to be made we bind ourselves and each of us, our and each of our heirs, successors, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 14th day of April, in the year of our Lord one thousand nine hundred and twenty-three.

Whereas, lately, at a term of the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas, in the suit pending in said Court between Mrs. Pearl Stone Dunken, Administratrix of the Estate of W. J. Dunken, deceased, as plaintiff, and the Aetna Life Insurance Company of Hartford, Connecticut, as Defendant, a judgment was rendered against said Aetna Life Insurance Company and Aetna Casualty and Surety Company, affirming the judgment of the Court below, and that said Mrs. Pearl Stone Dunken, Administratrix of the estate of W. J. Dunken, deceased, do have and recover of and from said Aetna Life Insurance Company, of Hartford, Connecticut, principal, and its surety, Aetna Casualty and Surety Company, the amount adjudged by the Court below, and all costs in this behalf expended, such judgment of the court below being for the sum of \$15,310.50, with legal interest from June 1, 1921, and all costs of suit; and said Aetna Life Insurance Company of Hartford, Connecticut, and said Aetna Casualty and Surety Company, having obtained a writ of error, and filed a copy thereof in the Clerk's office of said court to reverse the judgment in the aforesaid cause, and a citation directed to the said Mrs. Pearl Stone Dunken, [fol. 194] Administratrix of the estate of W. J. Dunken, deceased, citing and admonishing her to be and appear at Supreme Court of the United States to be holden at Washington, within thirty days from the date hereof.

Now, the condition of the above obligation is such that if said Aetna Life Insurance Company, of Hartford, Connecticut, and said Aetna Casualty and Surety Company, shall prosecute their writ of error to effect, and, shall answer damage and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and effect.

Aetna Life Insurance Company of Hartford, Connecticut,  
Aetna Casualty and Surety Company, By W. J. Moroney,  
Their Agent and Attorney in Fact. Fidelity and Deposit  
Company of Maryland, By Clarence S. Parker, Attorney-  
in-Fact.

Approved this April 16th, 1923, as a Supersedeas and Stay Execution.

W. M. Key, Chief Justice of the Court of Civil Appeals for  
the Third Supreme Judicial District of Texas.

[File endorsement omitted.]

No. 6492

[fol. 195] DUPLICATE WRIT OF ERROR FROM UNITED STATES SUPREME COURT [Omitted in printing; see side page 199]

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No. 6492

[fols. 196 & 197] DUPLICATE CITATION IN ERROR ON WRIT OF ERROR FROM THE UNITED STATES SUPREME COURT [Omitted in printing; see side page 203]

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[fol. 198] COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT, AT AUSTIN

No. 6492

AETNA LIFE INSURANCE COMPANY OF HARTFORD, CONN.,

VS.

Mrs. PEARL STONE DUNKEN, Administratrix

Appeal from McLennan County

BILL OF COSTS

Filing record, 50¢; Docketing cause, 50¢.....	\$1.00
Appearances, \$1.00; Filing Briefs, 80¢.....	1.80
Filing and entering 4 motions, at 35¢.....	1.40
Orders, 11 @ 50¢.....	5.50
Filing 18 extra papers @ 10¢.....	1.80
2 Continuances.....	.40
Judgment, \$1.00; Taxing costs, 50¢.....	1.50
Mandate, 1.50; Recording opinion, \$4.80.....	6.30
Certified copy, Bill of costs.....	.75
“ “ Orders to Sup. Ct. of Texas.....	2.00
Notices, 16 @ 50¢.....	8.00
Copy of Motion, Rehearing, \$1.00; Issuing 1 precept, \$1.00	2.00
Sheriff's fees.....	1.00
Supreme Court costs, on App. for writ of error (Texas)....	10.95
Transcript fee to U. S. Sup. Court.....	80.00
Binding Transcript.....	3.00
Total =.....	<u>\$127.40</u>

I, R. H. Connerly, Clerk of the Court of Civil Appeals of the Third Supreme Judicial District of Texas, do hereby certify that the foregoing 198 pages, including page No. 72 and 1/2, and the printed

copies of Insurance Policies Nos. 98322 (which is inserted between pages 52 and 53 hereof) and 152775 (which is inserted between pages 72 and 72½, hereof) contain true and correct copies of all proceedings had in the District Court of McLennan County, Texas, the Court of Civil Appeals of the Third Supreme Judicial District of Texas, and the Supreme Court of Texas, and the proceedings had on writ of error to the Supreme Court of the United States of America, and that the documents following this certificate are the Original Writ of error and Original Citation in error, in the cause in said Court of Civil Appeals numbered 6492, entitled—Aetna Life Insurance Company of Hartford, Conn., Appellant, vs. Mrs. Pearl Stone Dunken, Administratrix, Appellee, from District Court of McLennan County, Texas, and that I have retained in my office copies of said Original Writ of error and Original Citation in error. Witness my hand and the seal of said court, this the 30th day of April, A. D. 1923.

R. H. Connerly, Clerk Court of Civil Appeals, Third Supreme Judicial District of Texas. [Seal Court of Civil Appeals of the State of Texas.]

[fol. 199] IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

[Title omitted]

WRIT OF ERROR FROM UNITED STATES SUPREME COURT—Filed Apr. 16, 1923

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Civil Appeals in and for the Third Supreme Judicial District of Texas, before you or some of you, being the highest Court in said State in which a decision could be had in the suit between Mrs. Pearl Stone Dunken, Administratrix of the Estate of W. J. Dunken, Deceased, as Plaintiff, and the Aetna Life Insurance Company, of Hartford, Connecticut, as Defendant, and Aetna Casualty & Surety Company, Defendant's Surety, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or where was drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; or wherein a title, right, privilege or immunity was claimed under the Constitution or a treaty or statute of, or com-



mission held, or authority exercised under the United States, and the [fols. 200 & 201] decision was against the title, right, privilege or immunity specially set up and claimed under such Constitution, treaty, statute, commission or authority; or wherein a suit involving the validity of a contract where it is claimed that a change in the rule of law or construction of statutes by the highest Court of a State applicable to such contract would be repugnant to the Constitution of the United States, and such claim was made, and the decision was adverse to such claim, whereby a manifest error hath happened, to the great damage of said Aetna Life Insurance Company, of Hartford, Connecticut, and to said Aetna Casualty and Surety Company, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 16 day of April, in the year of our Lord one thousand nine hundred and twenty three.

D. H. Hart, Clerk District Court, Western District of Texas,  
By A. B. Coffee, Deputy. [The Seal of the U. S. District Court, Western Dist., Texas.]

Allowed: W. M. Key, Chief Justice of the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas.

[fol. 202] [File endorsement omitted.]

[fol. 203] IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

No. 6492

[Title omitted]

CITATION AND SERVICE—Filed Apr. 20, 1923

UNITED STATES OF AMERICA, ss:

To Mrs. Pearl Stone Dunken, administratrix of the estate of W. J. Dunken, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days

from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas, wherein the Aetna Life Insurance Company of Hartford, Connecticut, and Aetna Casualty and Surety Company, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this 16 day of April, in the year of our Lord one thousand nine hundred and twenty-three.

W. M. Key, Chief Justice of the Court of Civil Appeals in and for the Third Supreme Judicial District of Texas.

We hereby accept service of above citation in error, and waive further service thereof. This 16 day of April, 1923.

W. E. Spell, J. A. Stanford, Attorneys for Defendant in Error.

[fol. 204] [File endorsement omitted.]

Endorsed on cover: File No. 29,608. Texas Court of Civil Appeals, Third Supreme Court Judicial District. Term No. 325. Aetna Life Insurance Company and Aetna Casualty & Surety Company, plaintiffs in error, vs. Mrs. Pearl Stone Dunken, administratrix of the estate of W. J. Dunken, deceased. Filed May 7th, 1923. File No. 29,608.

(9767)

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In the  
**Supreme Court of the United States**

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October Term, 1923

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No. 325

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**AETNA LIFE INSURANCE COMPANY AND AETNA  
CASUALTY & SURETY COMPANY,**

**Plaintiffs in Error,**

**vs.**

**MRS. PEARL STONE DUNKEN, ADMINISTRATRIX  
OF THE ESTATE OF W. J. DUNKEN, DECEASED,**

**Defendant in Error.**

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**In Error to the Court of Civil Appeals of the Third Su-  
preme Judicial District of the State of Texas.**

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**BRIEF AND ARGUMENT BY PLAINTIFFS IN ER-  
ROR IN REPLY TO MOTION BY DEFENDANT  
IN ERROR TO DISMISS OR AFFIRM.**

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**To the Honorable Supreme Court of the United States:**

**STATEMENT.**

1. This writ of error is brought to review a judg-  
ment of said Texas Court of Civil Appeals against the



Aetna Life Insurance Company, as principal, and the Aetna Casualty & Surety Company, as surety on appeal bond, affirming a judgment of the District Court of McLennan County, Texas, in favor of Mrs. Pearl Stone Dunken, administratrix of the estate of Wiley J. Dunken, deceased, against said Insurance Company, and rendering judgment against the Insurance Company and its said surety (R. 26, 133).

The judgment of the trial court, which was affirmed, was for the principal sum of \$8700.00, the amount found to be due on an alleged life insurance policy of \$10,000.00, suit having been brought for the full face of the policy. Judgment was also rendered for \$1044.00 penalty and \$3000.00 attorney's fees under a Texas statute (R. 26-28).

A motion to dismiss or affirm has been made on the following alleged grounds only:

"1. Because the asserted Federal question finds no support in the evidence, and is made only by pleading.

2. Because the asserted Federal question is so lacking in merit, and devoid of any support in the evidence, as to be, therefore, frivolous."

The Federal questions relied on for reversal are presented at large in our assignments of error (R. 172), and they will be hereinafter stated.

We merely indicate at the outset that the Federal questions arise out of (1) the application of a Texas penalizing statute to a Tennessee contract; (2) penaliz-

ing a defendant for refusing to pay a demand largely in excess of what plaintiff actually recovered; and (3) rendering judgment under law and decisions having no application, without even a scintilla of relevant evidence to support it, and without due process of law. Other Federal questions, under the full faith and credit clause of the Constitution, and under the Act of Congress approved February 17, 1922, amending section 237 of the Judicial Code, will be noted as we proceed.

The motion does not question our mode of procedure, or that we exhausted our remedies in the state courts, or that the Federal questions were duly raised in the state courts. We will therefore not refer further to such considerations, except to say that the procedure conforms with the rules lately reannounced by this Court in *Randall vs. Board of Commissioners*, February 19, 1923.

(References to opinions of this Court not yet officially reported will give merely dates of decisions).

2. On December 17, 1910, Wiley J. Dunken, then a resident of Nashville, Tennessee, applied to the Nashville Agency of said Insurance Company for a "convertible term" \$10,000.00 policy of insurance on his life, and on January 28, 1911, the policy No. 98322 was issued. (R. 38-49).

Although this policy was payable at the Home Office of the Insurance Company at Hartford, Connecticut, it does not appear to be open to question that it was a

Tennessee contract, governed by the Tennessee laws. *Northwestern Mutual Life Ins. Co. vs. McCue*, 223 U. S. 234. However, as will presently appear, it is not material in this case whether the policy be considered a Tennessee or a Connecticut contract, it being sufficient that it clearly was not a Texas contract.

This policy gave the insured an option reading as follows:

“This policy may upon any anniversary of its date be exchanged without medical re-examination for any level premium life or endowment policy then being issued by the company at the attained insuring age of the insured covering any hazard covered by this policy on payment of the premium required for such policy at the advanced age of the insured; or it may be exchanged for such a policy now issued by said company, which shall bear the same date as this policy and be issued at the same age, on payment of the difference between the premiums already paid hereon for an amount of insurance equalling that of the new policy and those that would have been required under the new policy with six per cent interest, provided in either case that the premiums required by such new policy shall be paid at the times stipulated for payment of premiums under this policy, that the issue of the new policy will not violate any law, that application for such new policy be made and this policy returned to the Home Office of said Company before default in the payment of premium and within five years from its date, that the amount of insurance shall not be increased or the premium rate per \$1,000.00 of insurance be less than that required by this policy, and that if such policy is on the instalment plan, the present value at the beginning of the instalment period of all the instalment payments required of the Com-

pany shall be considered the amount of insurance under such policy." (R. 41).

Several years later the insured changed his residence to Waco, Texas, and having kept said original policy in force, on February 19, 1916, the insured, acting under the option heretofore quoted, made written application to the Insurance Company to convert said term policy into a "20 payment life commercial" policy, to bear same date as the term policy.

Among other matters unnecessary to detail, said application stated as follows:

"I, Wiley J. Dunken, of Waco, County of McLennan, State of Texas, hereby apply to the Aetna Life Insurance Company for changed insurance on my life, in accordance with the conditions of Term Policy No. 98322 issued by said Company, and I hereby certify that said policy has not been assigned, **and agree that the statements and answers in the application for said Term Policy shall be the basis of the new contract or policy herein applied for and form a part of the same**, except that kind of policy, amount of the same, and the premium thereon, shall be as specified below." (R. 76).

This "application for conversion," with the term policy, was mailed by the insured to the Nashville agent of the Insurance Company, who forwarded these papers to the Home Office of the Company at Hartford, which "issued" a new policy No. 152775 in accordance with said original application and application for conversion, marked the term policy "cancelled," and forwarded the

new policy to its Nashville agent with a letter of instructions, which is not quoted here because it was in substance reproduced in letter hereinafter quoted from the Nashville agent, H. B. Alexander, to the insured.

The new policy was issued for a higher premium rate, and in order to complete the conversion it was necessary for the insured to pay (or otherwise arrange) the difference in premiums from the date of said policies, with interest, together with the premium for the current policy year. It was agreed that the Insurance Company would lend the full loan value of the new policy upon execution and delivery of proper loan papers, the balance to be paid in cash by the insured.

Accordingly, on March 4, 1916, the said Nashville agent, Mr. Alexander, mailed to the insured the following letter, with enclosures as stated:

“Nashville, Tenn., 3-4-16.

Mr. W. J. Dunken,  
115 So. 5th St.,  
Waco, Texas.

Dear Mr. Dunken:

I take pleasure in handing you herewith your \$10,000.00 Commercial 20 pay L. policy converted from Seven Year Term.

I also enclose a loan note which must be signed by you, with two witnesses to your signature, whose addresses should be given. Also please sign the form 378, which authorizes the Company to deduct the 1916 premium from the proceeds of the loan.



The amount due now to complete the transaction is \$312.97, which is determined as follows:

Conversion cost .....	\$1,020.88
1916 premium and interest .....	279.09

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\$1,299.09

Deduct net loan .....	987.00
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\$ 312.97

Please do not fail to send me your policy when returning me the above. Thanking you, I remain,

Sincerely yours, (Signed) H. B. Alexander, Manager." Encls. (R. 66-67).

This letter, with enclosures, was received by Mr. Dunken in due course of mail within a few days (R. 95), but although he lived until June 1, 1916 (R. 86) he merely put the letter and enclosures in his safe, never answered it, never executed the loan papers, never performed his contract or tendered performance in any way, and no reason or excuse for such failure is shown by the record—unless it is inferred that financial inability was the reason (R. 84-85).

Meanwhile the original or term policy lapsed through failure to pay, on or before its maturity, March 29, 1916, a note the insured had given to keep the term policy in force until the conversion could be completed (R. 63, 83).

3. After the insured moved to Texas he had no communication or negotiation with the Insurance Company except by correspondence with its Nashville agent, which terminated with said letter of March 4, 1916, written near-

ly a month before the term policy lapsed and nearly three months before the insured died (R. 94). The correspondence between the Company and its Nashville agent shows that the Company itself treated the entire insurance as having lapsed long before the insured died (R. 110-112). There is not a scintilla of evidence of any waiver by the Insurance Company. While the Insurance Company was licensed to do business and doing business in Texas, no Texas representative of the Insurance Company had anything whatever to do with the transactions involved in this suit.

Under these facts—and other facts that will be stated—the Insurance Company contended: (1) that the original or term policy lapsed as provided by its terms; (2) that the second policy never became a completed or binding contract; and (3) that if the second policy ever did become a binding contract it was also a Tennessee contract (a) because the letter transmitting the policy was mailed in Tennessee, and (b) because the second policy was not a new or independent contract, but it was “issued” in performance of an obligation expressed in the original Tennessee contract granting the insured an option which he afterwards exercised or sought to exercise. *United States vs. McMullen*, 222 U. S. 460; *Sandoval vs. Randolph*, 222 U. S. 161.

While on this subject we will add that the **original** application, on which the term policy was issued, was expressly made a part of the **second** policy, to which a copy

of said original application was attached, the second policy reciting its insurance <sup>^</sup> "in consideration \* \* \* of the application for this policy, which application is hereby made part of this contract and a copy of which is attached hereto." (See this recital in second policy, R. 68; original application attached to second policy, R. 77-82).

From these references to the record the Court can easily appraise the statements in said motion to dismiss or affirm (page 7) that "the new policy by its own terms makes it a separate, distinct, independent contract, complete in itself," and the further statement (page 8) that "the new policy nowhere even refers to the old one." This in the face of said application for conversion, heretofore quoted, a copy of which was attached to and made a part of the **new** policy (R. 76), and which applies for the conversion "in accordance with the conditions of Term Policy No. 98322 \* \* \* and I agree that the statements and answers in the application for said Term Policy shall be the basis of the new contract or policy herein applied for and form a part of the same." (R. 76).

An inspection of said policies (R. 39, 67) shows that each policy gives the insured a number of options; and when an election is made under any option granted in the original policy, and on the terms therein provided for, it is not perceived that to evidence such election there is any legal difference between attaching a "rider,"

declaring the election, to the original policy, and issuing a new policy with the election in the body of the instrument. It cannot properly be said in either case that the Insurance Company has made "a new and independent contract," when it has only done what it originally contracted to do when so requested. (*United States vs. McMullen; Sandoval vs. Randolph*, cited *supra*).

If this is sound, said motion to dismiss or affirm in substance admits—at least by implication—that the judgment of the Texas Court of Civil Appeals should be reversed, regardless of other questions in the record, all of which will appear more clearly as we proceed.

4. Under proper pleading (R. 11, 21) it was proved by the Insurance Company that under the statutes of Tennessee and Connecticut (being public acts of said states) no penalties or attorney's fees could be recovered in this case (R. 96).

Under the facts thus generally stated plaintiffs in error here present the following assignment of error:

"The Court of Civil Appeals erred in overruling and refusing to sustain plaintiffs in error's original assignment of error No. 11, objecting and excepting to the judgment of the trial court as follows:

"To the judgment for damages and attorney's fees, because (1) plaintiff not having recovered the full amount sued for, the statute is not applicable in any event; and (2) because the evidence conclusively shows that said policy, even if it is a completed contract, is

not a Texas contract, or governed by the Texas statutes authorizing the recovery of damages and attorney's fees as therein provided; that said alleged policy is governed by the laws of the State of Tennessee (or if not, it is governed by the laws of the State of Connecticut); that under the laws of Tennessee and Connecticut no damages, penalty or attorney's fees can be recovered under the facts of this case, and that to construe said Texas statutes as applying to said policy would be in violation of the Constitution of the United States, and especially of Article I, Section 10, prohibiting the passage of any law impairing the obligation of contract, and of Article 40, Section 1, providing that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and of Section 1 of the Fourteenth Article of Amendment, providing that no State shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." (R. 172).

5. Plaintiff having sued in the alternative (thus treating both policies as one contract) (R. 1-6), there were three trials of this case. On the first trial plaintiff recovered judgment on the **first** policy, with penalty and attorney's fees under the Texas statute. On appeal this judgment was reversed, but the Court of Civil Appeals



overruled the Insurance Company's assignment of error complaining of the judgment for penalty and attorney's fees under the Texas statute, although the judgment was on the **first** policy, which was indisputably a Tennessee contract. (Aetna Life Ins. Co. vs. Dunken, 204 S. W. 241).

On the second trial judgment was rendered for the Insurance Company on a directed verdict, the trial court holding that plaintiff was not entitled to recover on either policy. On appeal this judgment was also reversed. (Dunken vs. Aetna Life Ins. Co., 221 S. W. 691).

On the third trial judgment was rendered for plaintiff on the **second** policy (less a credit of \$1300.00), and for penalty and attorney's fees under the Texas statute as heretofore stated. On appeal this judgment was affirmed; and other proceedings were had as shown by this record. (For opinion of the Court of Civil Appeals on the third trial see Record p. 130).

6. On the Federal question arising from the proposition that a statutory penalty and attorney's fee cannot be properly recovered when plaintiff demanded and sued for substantially more than she recovered, defendant in error appears to contend that this proposition, even if sound in law, is not supported by the record in this case, on the alleged ground that plaintiff did not in fact demand or sue for more than she recovered. We will cite the record on this issue.

Plaintiff's pleadings (R. 1-5, 12-19) show that plain-

tiff sued in the alternative to recover the full amount of \$10,000.00 principal on either one policy or the other, without admitting any credit or deduction whatever, either expressly or by necessary implication. Plaintiff expressly alleged as follows:

"Plaintiff would further represent and show to the Court that, notwithstanding, the defendant became bound and obligated to pay to the Administratrix of the estate of W. J. Dunken, deceased, **said sum of \$10,000.00**, as above set out, and notwithstanding, plaintiff has made demand upon defendant for the payment of **said amount**, yet plaintiff says that defendant has wholly failed and refused to pay same, although long since due and payable, and that by reason of defendant's failure and refusal to pay said amount, plaintiff has been compelled to employ attorneys to bring suit to enforce the payment of **said amount**, by reason of which the defendant became liable to plaintiff for 12% of the amount of said policy as damages and reasonable attorney's fees in the sum of \$3000.00." (R. 5).

The amount that was allowed as a credit was alleged only in the Insurance Company's answer, a defensive pleading, the burden being on the Insurance Company to establish it (R. 6-19).

It is true that in plaintiff's prayer for relief (R. 5) she asked judgment for the full amount of one policy or the other, "less any indebtedness, if **any**, on said policy," but, as already shown, she admitted no indebtedness, and demanded the full amount, placing the burden on the Insurance Company on this issue. Of course the amount for which plaintiff sued is the maximum amount

she could recover under her pleadings. There is nothing in the record qualifying plaintiff's allegation that she had **demand**ed the full sum of \$10,000.00 before suit.

7. Plaintiffs in error also present other assignments of error as follows:

(Second)

"The Court of Civil Appeals erred in overruling and refusing to sustain plaintiffs in error's original assignment of error No. 11(e), excepting and objecting to the judgment in favor of plaintiff against defendant, for any amount, because said judgment is in violation of the Constitution of the United States, and especially of Article 1, Section 10 prohibiting the passage of any law impairing the obligation of contracts, and of Article 40, Section 1, providing that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and of Section 1 of the Fourteenth Article of Amendment, providing that no State shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." (R. 173).

(Third)

"The Court of Civil Appeals erred in affirming the judgment of the trial court, because this suit involves the validity of a contract, and such affirmance is based on a change in the rule of law or construction of statutes by the highest Court of the State of Texas applicable to such contract, in violation of the Constitution of the United States, and especially of Article 1, Section 10, prohibiting the passage of any law impairing the

obligation of contracts, and Article 40, Section 10, providing that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and of Section 1 of the Fourteenth Article of Amendment, providing that no State shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." (R. 173-4).

These assignments will be further referred to in argument.

## ARGUMENT.

### I.

In some respects our assignments of error present propositions that we do not expect to argue or rely upon, now or later. In view of a recent Act of Congress, not yet construed by this court, as we are advised, and in view of recent decisions, we are not clear how far this Court's authority to review extends, and we are not now prepared to discuss this subject even to our own satisfaction. It seems sufficient, for present purposes, to show that the record presents at least one Federal question of at least a seriously debatable character, even if reversible error is not now clearly apparent. We think that the record presents several Federal questions, each clearly showing reversible error, especially as to the judgment for statutory penalty and attorney's fees. However, in this argument we will not attempt an exhaustive citation of authorities.

## II.

The judgment for penalty and attorney's fees in this case was rendered under Article 4746, Texas Revised Statutes, reading as follows:

"In all cases where a loss occurs and the life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company liable therefor shall fail to pay the same within thirty days after demand therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent damages on the amount of such loss together with reasonable attorney fees for the prosecution and collection of such loss."

We are not making a general attack on the constitutionality of this statute in cases where it is properly applicable. Our position is that (a) **as construed and applied in this case**, to a foreign contract, it is unconstitutional; and (b) that it is unconstitutional when construed as applying to a case where plaintiff had previously demanded or subsequently sued for substantially more than she was entitled to recover under the court's judgment, even if otherwise the statute would be applicable.

The Texas statute above quoted was in effect when the policies involved in this suit were issued; and we recognize the general rule that when the contract clause of the Constitution **alone** is involved, a **valid** statute, **under which a contract is made**, and which is so construed and applied as not to invade any inalienable Federal right, cannot be said to impair the obligation



of the contract. The law of a contract is part of it. *Farmers & Merchants Bank vs. Federal Reserve Bank*, June 11, 1923. In declining to observe the Tennessee statute the state court failed to give full faith and credit to such statute.

This Court, in reviewing decisions of State courts (except under a recent Act of Congress hereinafter mentioned) accepts the construction and application of State courts to state statutes, and this Court then determines for itself whether or not the statute, as so construed and applied, invades any Federal right. *Douglas vs. Noble*, February 19, 1923. In deciding such a question this Court looks to the entire record, including both law and fact. *Bluefield Water Works vs. Public Service Comm.*, June 11, 1923.

But when a State court, by unwarranted construction, extends the application of a State statute to contract rights not arising under the statute, the obligation of the contract is unconstitutionally impaired. *Georgia R. & P. Co. vs. Town of Decatur*, June 4, 1923; *Georgia R. & P. Co. vs. Mayor, etc.*, June 4, 1923. This is precisely the case we have here. The obligation of a contract is impaired by adding to such obligation, as well as by subtracting from it. *Georgia R. & P. Co. vs. Town of Decatur*, *supra*. And the obligation of a contract must be determined by the law under which it was made, which in this case is the law of Tennessee. *Northwestern Mutual Life Ins. Co. vs. McCue*, 223 U. S. 234; *Gaston*,

Williams and Wigmore vs. Warner, November 13, 1922; Minnesota, etc., Assn. vs. Benn, February 10, 1923.

### III.

The recent opinion of this Court in C. & N. W. Ry. Co. vs. Nye Schneider & Fowler Co., decided November 13, 1922, on writ of error to the Supreme Court of Nebraska, appears to be decisive in support of our proposition that when a State statute is so construed and applied as to allow statutory damages or attorney's fees when plaintiff recovers substantially less than he has demanded and sued for, the statute, as thus construed, violates defendant's constitutional rights. The instant case squarely presents the identical question there decided, and we will here cite no additional authority.

### IV.

For present purposes we have probably said enough; but, without extended argument or citation of authorities, we will refer to a recent statute, and to some recent decisions of this Court rendered without reference to such statute.

By Act of Congress approved June 17, 1922, amending Section 237 of the Judicial Code (42 Statutes at Large 366) the jurisdiction of this Court, and its authority to review on writ of error to a State court, is extended as follows:

“In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a State applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall, upon writ of error, re-examine, reverse, or affirm the final judgment of the highest court of a State in which a decision in that suit could be had, if said claim is made in said court at any time before said final judgment is entered and if the decision is against the claim so made.”

We have found no opinion construing this statute. Whatever may be said of it as a **sole** ground of jurisdiction (*Columbia Co. vs. South Carolina*, February 19, 1923; *Rooker vs. Fidelity Trust Co.*, same date), it seems clear that when—as in this case—jurisdiction has attached on other grounds, this Court’s authority to review is enlarged to the extent stated in the Act. Previous decisions on the scope of review were based on the original statute, and the amended statute first construed by a divided Court in *Murdock vs. Mayor of Memphis*, 20 Wall. 590, followed in many subsequent cases. Where the jurisdiction of this Court is clear, we think that the Congress may extend the scope of review as it may deem proper.

In such cases this Court may exercise its independent judgment on non-Federal questions to the extent authorized by Act of Congress.

We will not protract this argument by citing the long line of decisions of Texas courts in effect overruled

in this case. However, we will here refer to the opinions of the Supreme Court of Texas in *Equitable Life Assurance Society vs. Ellis*, 147 S. W. 1152; 152 S. W. 625 (a waiver case), holding that a default by the insured is not waived except by some "unequivocal act" of the insurer **subsequent** to the default indicating a clear intention to waive; that "time becomes of the essence of the contract;" that "we fully subscribe to the doctrine that in such cases the forfeiture occurs *ipso facto*, and no act of the Company need be done either to declare it or enforce it;" and that the law "in itself presents no remedy against the contract the parties have themselves made."

The record now before this Court conclusively shows that the Insurance Company did nothing **subsequent** to the default except to declare the entire insurance lapsed and try to secure the surrender of the policy on which the judgment in this case was rendered. Under the recent Act of Congress above referred to we think that this judgment, in effect overruling the *Ellis Case*, is reviewable by this Court, without deciding whether or not the question is an independent ground of jurisdiction.

It is true that the **opinion** in this case does not purport to overrule the *Ellis Case*, but the State **law** of this case is to be found in the final judgment of the State court, read in the light of the entire record.

## V.

But wholly aside from said recent Act of Congress, can property rights be in effect confiscated, consistent with due process of law, merely by observing forms of procedure, ignoring or plainly misconstruing the record, and basing the decision on wholly irrelevant or supposititious grounds? Such is this case. If this question is to be answered affirmatively, is not the way open for ingenuity gradually to undermine the Constitution as the supreme law of the land? Where, without submerging this Court, is the line to be drawn?

We will not now argue these questions, but we refer to the recent cases of *Columbia etc. Co. vs. South Carolina*, decided February 19, 1923, and especially to *Moore vs. Dempsey*, decided the same date.

It sufficiently appears from the cases heretofore cited that the various opinions of the Texas courts in this case, invoking various Texas statutes, are wholly without foundation, consistent with the contract and due process clauses of the Constitution, and that the substantial merits of the case were completely ignored. To these citations we add *Simon vs. Southern Ry. Co.*, 236 U. S. 115, holding that State statutes regulating licensed foreign corporations have no application to contracts not arising under such statutes. The opinion and decision of the State court in the instant case are in direct conflict with the case here cited.

We respectfully pray that the motion to dismiss or affirm be overruled.

Respectfully Submitted,

W. J. MORONEY,  
Attorney for Plaintiffs in Error.

JOHN R. MORONEY,  
Of counsel.

Dallas, Texas.



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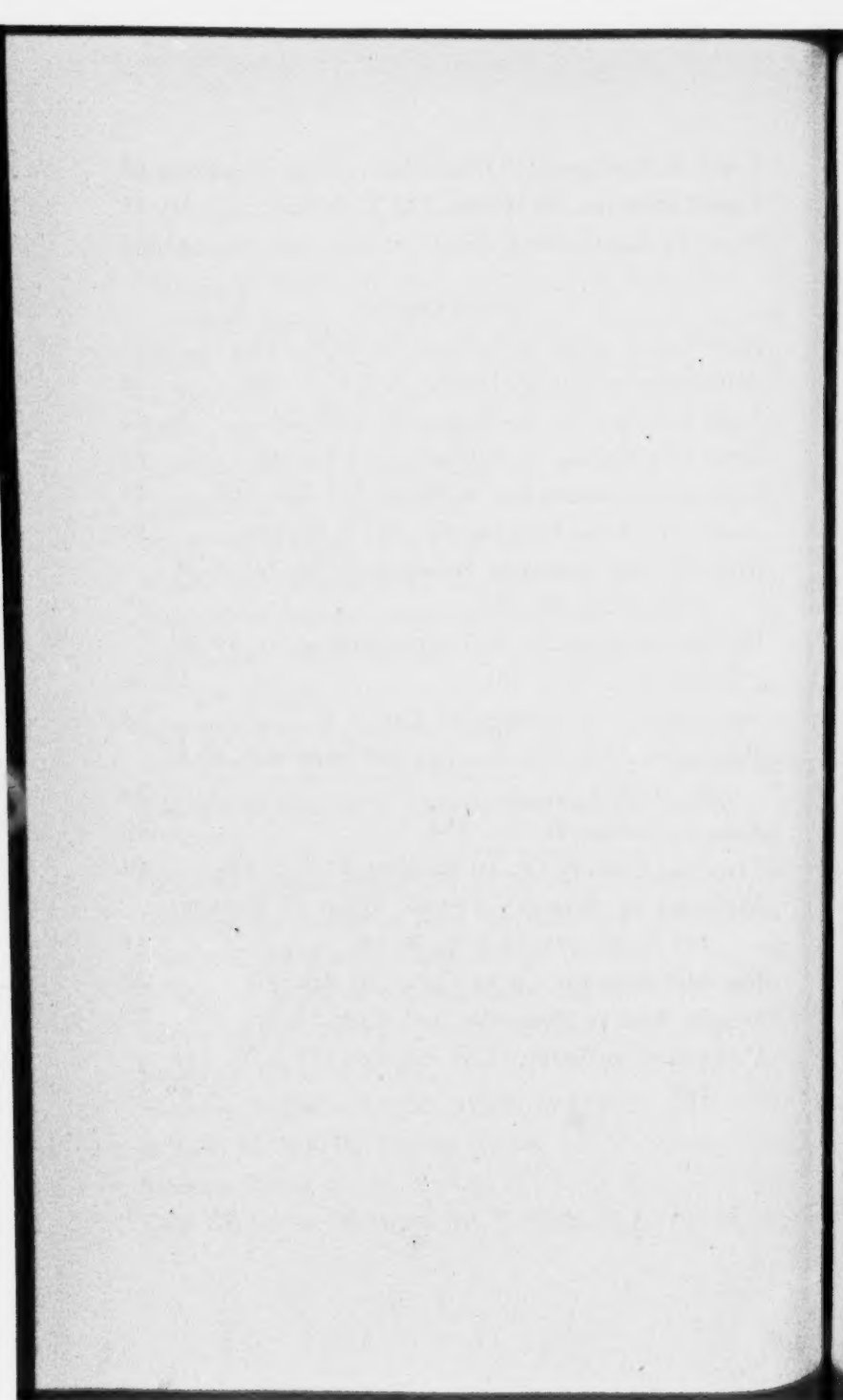
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In The  
**Supreme Court of the United States**

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October Term, 1923.

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No. 325

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AETNA LIFE INSURANCE COMPANY AND  
AETNA CASUALTY & SURETY COMPANY,  
Plaintiffs in Error,

vs.

MRS. PEARL STONE DUNKEN, ADMINISTRA-  
TRIX OF THE ESTATE OF W. J. DUNKEN,  
DECEASED,  
Defendant in Error.

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In Error to the Court of Civil Appeals of the Third Su-  
preme Judicial District of the State of Texas.

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**BRIEF AND ARGUMENT BY PLAINTIFFS IN ERROR**

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*To the Honorable Supreme Court of the United States:*

**STATEMENT OF THE CASE.**

This writ of error is brought to review a judgment of the Texas Court of Civil Appeals, Third District, in favor of Mrs. Pearl Stone Dunken, administratrix of

the estate of W. J. Dunken, deceased, against the Aetna Life Insurance Company, as principal, and the Aetna Casualty & Surety Company, as surety on appeal bond, affirming a judgment of the District Court of McLennan County, Texas.

The judgment of the trial court, which was affirmed, was for the principal sum of \$8700.00 and \$2566.50 interest, the amount found to be due on an alleged life insurance policy of \$10,000, *suit having been brought for the full face of the policy*. Judgment was also rendered for \$1044.00 penalty and \$3000.00 attorney's fees *under a Texas Statute*, total \$15,310.50. The judgment bears legal interest from its date, with costs (R. 26-28).

A motion to dismiss or affirm has been heretofore made on these alleged grounds only:

"1. Because the asserted Federal question finds no support in the evidence, and is made only by pleading.

2. Because the asserted Federal question is so lacking in merit, and devoid of any support in the evidence, as to be, therefore, frivolous."

The motion (to which we will reply in this brief) does not question our mode of procedure, or that we exhausted our remedies in the state courts, or that the reviewable questions were duly raised in the state courts. (For proceedings in Texas Supreme Court, see R. 148-168.)



Therefore, we will not refer further to such considerations, except to say that the procedure conforms with the rules lately reannounced by this Court in *Randall v. Board of Commissioners*, 261 U. S. 252.

The questions here presented for review are stated in our assignments of error (R. 172), hereinafter copied; but, in order that the relevancy of our statements from the record may be more readily understood as we proceed, we will here outline these questions in the following propositions:

(a) The alleged policy or contract on which judgment was rendered never became a completed or binding contract. It was at most an unaccepted tender of execution by the Insurance Company, on terms previously agreed on, but never complied with by the insured. The facts being undisputed, the judgment of the state court, being without even a plausible semblance of foundation, and also violative of the contract and equal protection clauses of the Constitution, was utterly devoid of the substance of due process of law; and, as the judgment establishes a change in the rule of law, in violation of the Insurance Company's constitutional rights, it is also within the scope of the Act of Congress, approved February 17, 1922 (42 Stat. 366), amending Section 237 of the Judicial Code, recently construed in *Tidal Oil Company vs. Flanagan*, January 7, 1924.

This proposition presents the question under the recent statute above cited, whether or not plain confiscation

under the mere forms of law is consistent with the Constitution of the United States, thus opening a broad way for its circumvention.

(The foregoing proposition goes to the merits of the whole case. The following propositions bear particularly on the judgment for penalty and attorney's fees under the Texas statute.)

(b) The alleged policy (if a contract at all) was not a Texas contract. It was a Tennessee contract (or if not, it was a Connecticut contract); and it appearing from the pleading and undisputed evidence that under the statutes of Tennessee and Connecticut (being public acts of said states), no penalty or attorney's fee was recoverable, this part of the judgment is violative of the contract clause, the full faith and credit clause, and the due process and equal protection clauses of the Constitution of the United States.

(c) Even if the alleged policy had been a binding Texas contract, as plaintiff demanded and sued for substantially more (\$1300.00) than she recovered, the suit was rightfully defended; and the Texas statute, *as construed and applied in this case*, violates the due process and equal protection clauses of the Fourteenth Amendment. *C. & N. W. Ry. Co. vs. Nye Schneider Fowler Co.*, 260 U. S. 35

We will now state the record bearing on the foregoing propositions.

(3) On December 17, 1910, W. J. Dunken, then a

resident of Nashville, Tennessee, applied to said Insurance Company through its Nashville agency for two policies on his life, for \$10,000.00 each, one a "20-payment life commercial," and the other a "7-year convertible term" (R.47).

Both policies were issued on January 28, 1911. The "20-payment life commercial" policy (No. 98,321) was kept in force, and paid without controversy on the death of the insured, and is not in issue here. It is mentioned only as part of the history of the transaction, to explain various references to it in the record.

Policy No. 98,322 (the "convertible term" policy) (R. 38-49) is in issue here, plaintiff having sued on it, or in the alternative to recover on an alleged "converted" policy hereinafter mentioned (R. 1-6) on which judgment was rendered (R. 26-29).

Although this "convertible term" policy was payable at the Home Office of the Insurance Company at Hartford, Connecticut, it does not appear open to question that it was a Tennessee contract, governed by the Tennessee laws. *Northwestern Mutual Life Ins. Co. vs. McCue*, 223 U. S. 234. However, as will presently appear, it is not material in this case whether the policy be considered a Tennessee or a Connecticut contract, it being sufficient that it clearly was not a Texas contract.

This policy gave the insured an option reading as follows:

"This policy may upon any anniversary of its date be exchanged without medical re-examination for any level premium life or endowment policy then being issued by the company at the attained insuring age of the insured covering any hazard covered by this policy on payment of the premium required for such policy at the advanced age of the insured; or it may be exchanged for such a policy now issued by said company, which shall bear the same date as this policy and be issued at the same age, on payment of the difference between the premiums already paid hereon for an amount of insurance equaling that of the new policy and those that would have been required under the new policy with six per cent interest, provided in either case that the premiums required by such new policy shall be paid at the times stipulated for payment of premiums under this policy, that the issue of the new policy will not violate any law, that application for such new policy be made and this policy returned to the Home Office of said Company before default in the payment of premium and within five years from this date, that the amount of insurance shall not be increased or the premium rate per \$1,000.00 of insurance be less than that required by this policy, and that if such policy is on the instalment plan, the present value at the beginning of the instalment period of all the instalment payments required of the Company shall be considered the amount of insurance under such policy." (R.41.)

Several years later the insured changed his residence to Waco, Texas, and having kept said original "convertible term" policy in force, on February 19, 1916, the insured, acting under the option heretofore quoted, made

written application to the Insurance Company to convert said term policy into a "20-payment life commercial" policy, to bear same date as the term policy.

Among other matters unnecessary to detail, said application stated as follows:

"I, Wiley J. Dunken, of Waco, County of McLennan, State of Texas, hereby apply to the Aetna Life Insurance Company for changed insurance on my life, in accordance with the conditions of Term Policy No. 98322 issued by said Company, and I hereby certify that said policy has not been assigned, *and agree that the statements and answers in the application for said Term Policy shall be the basis of the new contract or policy herein applied for and form a part of the same*, except that kind of policy, amount of the same, and the premium thereon, shall be as specified below." (R. 76).

This "application for conversion," with the term policy, was mailed by the insured to the Nashville agent of the Insurance Company, who forwarded these papers to the Home Office of the Company at Hartford, which "issued" a new policy No. 152775 in accordance with said original application and application for conversion, marked the term policy "cancelled," and forwarded the new policy to its Nashville agent with a letter of instructions (R. 66), which is not quoted here because it was in substance reproduced in letter hereinafter quoted from the Nashville agent, H. B. Alexander, to the insured.

The new policy was issued for a higher premium rate, and in order to complete the conversion it was necessary for the insured to pay (or otherwise arrange) the difference in premiums from the date of said policies, with interest, together with the premium for the current policy year. It was agreed that the Insurance Company would lend the full loan value of the new policy upon execution and delivery of proper loan papers, the balance to be paid in cash by the insured.

Accordingly, on March 4, 1916, the said Nashville agent, Mr. Alexander, mailed to the insured the following letter, with enclosures as stated:

Nashville, Tenn. 3-4-16.

Mr. W. J. Dunken,  
115 So. 5th St.,  
Waco, Texas.

Dear Mr. Dunken:

I take pleasure in handing you herewith your \$10,000.00 Commercial 20 pay L. policy converted from Seven Year Term.

I also enclose a loan note, which must be signed by you, with two witnesses to your signature, whose addresses should be given. Also please sign the form 378, which authorizes the Company to deduct the 1916 premium from the proceeds of the loan.

The amount due now to complete the transaction is \$312.97, which is determined as follows:

Conversion cost .....	\$1,020.88
1916 premium and interest .....	279.09

---

\$1,299.09



Deduct net loan..... 987.00

\$ 312.97

Please do not fail to send me your policy when returning me the above. Thanking you, I remain,  
Sincerely yours, (Signed) H. B. Alexander, Mgr."  
Encls. (R.66-67.)

It is not disputed that the above statement is correct. This letter, with enclosures, was received by Mr. Dunken in due course of mail within a few days (R. 95), but although he lived until June 1, 1916 (R. 86), he merely put the letter and enclosures in his safe, never answered it, never executed the loan papers, never performed his contract (or proposition) or tendered performance in any way, and no reason or excuse for such failure is shown by the record—unless it is inferred that financial inability was the reason (R. 84-85).

Meanwhile, the original or term policy lapsed through failure to pay, on or before its maturity, March 29, 1916, a note the insured had given to keep the term policy in force until the conversion could be completed (R. 63, 83). Underwood vs. Security Life Ins. Co., 194 S. W. 585, 588 (Texas Supreme Court).

(4) After the insured moved to Texas he had no communication or negotiation with the Insurance Company, except by correspondence with its Nashville agent, which terminated with said letter of March 4, 1916, written nearly a month before the term policy lapsed and

nearly three months before the insured died (R. 94). The correspondence between the Company and its Nashville agent shows that the Company itself treated the entire insurance as having lapsed long before the insured died (R. 110-112). There is not a scintilla of evidence of any waiver by the Insurance Company. No Texas representative of the Insurance Company had anything whatever to do with the transactions involved in this suit.

Under these facts—and other facts that will be stated—the Insurance Company contended: (1) that the original or term policy lapsed as provided by its terms; (2) that the second policy never became a completed or binding contract; and (3) that if the second policy ever did become a binding contract it was also a Tennessee contract (a) because the letter transmitting the policy was mailed in Tennessee (*Hartford Life Ins. Co. vs. Lasher Stocking Co.*, 29 Atl. 629; 65 L. R. A. 837, Note), and (b) because the second policy was not a new or independent contract, but it was “issued” in performance (or tender of performance) of an obligation expressed in the original Tennessee contract granting the insured an option which he afterwards exercised or sought to exercise. *United States vs. McMullen*, 222 U. S. 460; Note, 63 L. R. A. 846.

While on this subject we will add that the *original* application, on which the term policy was issued, was expressly made a part of the *second* policy, to which a copy of said original application was attached, the second policy

reciting its issuance "in consideration \* \* \* of the application for this policy, which application is hereby made part of the contract and a copy of which is attached hereto." (See this recital in second policy, R. 68; original application attached to second policy, R. 77-82.)

From these references to the record the Court can easily appraise the statements in said motion to dismiss or affirm (page 7) that "the new policy by its own terms makes it a separate, distinct, independent contract, complete in itself," and the further statement (page 8) that "the new policy no where even refers to the old one." This in the face of said application for conversion, heretofore quoted, a copy of which was attached to and made a part of the *new* policy (R. 76), and which applies for the conversion "in accordance with the conditions of Term Policy No. 98322 \* \* \* and I agree that the statements and answers in the application for said Term Policy shall be the basis of the new contract or policy herein applied for and form a part of the same." (R. 76.)

An inspection of said policies (R. 39, 67) shows that each policy gives the insured a number of options; and when an election is made under any option granted in the original policy, and on the terms therein provided for it is not perceived that to evidence such election there is any legal difference between attaching a "rider," declaring the election, to the original policy, and issuing a new policy with the election in the body of the instrument. It cannot properly be said in either case that the

Insurance Company has made "a new and independent contract," when it has only done—or rather offered to do—what it originally contracted to do, when requested, on compliance with the terms of the original contract. (United States vs. McMullen, and other authorities, cited *supra*.)

(If this is sound, said motion to dismiss or affirm in substance admits—at least by implication—not only that this Court has jurisdiction but that the judgment of the Texas Court of Civil Appeals should be reversed, regardless of other questions in the record, all of which will appear more clearly as we proceed.)

(5) Under proper pleading (R. 11, 21) it was proved by the Insurance Company that under the statutes of Tennessee and Connecticut (being public acts of said states) no penalties or attorney's fees could be recovered in this case (R. 96).

(6) Plaintiff having sued in the alternative (thus treating both policies as successive phases of one contract) (R. 1-6), there were three trials of this case. On the first trial, plaintiff recovered judgment on the *first* policy, with penalty and attorney's fees under the Texas statute. On appeal this judgment was reversed, but the Court of Civil Appeals overruled the Insurance Company's assignment of error complaining of the judgment for penalty and attorney's fees under the Texas statute,

although the judgment was on the *first* policy, which was indisputably a Tennessee contract. (Aetna Life Ins. Co. vs. Dunken, 204 S. W. 241.)

On the second trial judgment was rendered for the Insurance Company on a directed verdict, the trial court holding that as a matter of law plaintiff was not entitled to recover on either policy. On appeal this judgment was also reversed. (Dunken vs. Aetna Life Ins. Co., 221 S. W. 691.)

On the third trial judgment was rendered for plaintiff on the *second* policy (less a credit of \$1300.00), and for penalty and attorney's fees under the Texas statute as heretofore stated. On appeal this judgment was affirmed; and other proceedings were had as shown by this record. (For opinion of the Court of Civil Appeals on the third trial, 248 S. W. 165, see Record, p. 130.)

(7) On the Federal question arising from the proposition that a statutory penalty and attorney's fee cannot be properly recovered, consistent with due process of law, when plaintiff demanded and sued for substantially more than she recovered, defendant in error appears to contend that this proposition, even if sound in law, is not supported by the record in this case, on the alleged ground that plaintiff did not in fact demand or sue for more than she recovered. We will cite the record on this issue.

Plaintiff's pleadings (R. 1-5, 12-19) show that plaintiff sued in the alternative to recover the full amount of \$10,000.00 principal on either one policy or the other,

without admitting any credit or deduction whatever, either expressly or by necessary implication. Plaintiff expressly alleged as follows:

"Plaintiff would further represent and show to the Court that, notwithstanding, the defendant became bound and obligated to pay to the Administratrix of the estate of W. J. Dunken, deceased, *said sum of \$10,000.00*, as above set out, and notwithstanding, plaintiff has made demand upon defendant for the payment of *said amount*, yet plaintiff says that defendant has wholly failed and refused to pay same, although long since due and payable, and that by reason of defendant's failure and refusal to pay said amount, plaintiff has been compelled to employ attorneys to bring suit to enforce the payment of *said amount*, by reason of which the defendant became liable to plaintiff for 12% of the amount of said policy as damages and reasonable attorney's fees in the sum of \$3000.00." (R.5.)

The amount that was allowed as a credit was alleged only in the Insurance Company's answer, a defensive pleading, the burden being on the Insurance Company to establish it (R. 6-19).

It is true that in plaintiff's prayer for relief (R. 5) she asked judgment for the full amount of one policy or the other, "less any indebtedness, *if any*, on said policy," but, as already shown, she admitted no indebtedness, and demanded the full amount, placing the burden on the Insurance Company on this issue. Of course the amount for which plaintiff sued is the maximum amount



she could recover under her pleadings. There is nothing in the record qualifying plaintiff's allegation that she had *demand*ed the full sum of \$10,000.00 before suit.

Under these facts, and other facts to be referred to in argument, the Insurance Company, at every seasonable opportunity, in the trial court, the Court of Civil Appeals and the Supreme Court of Texas, urged the defenses outlined in the propositions heretofore stated, and further stated in the assignments of error in this Court, which will now be presented.

#### FIRST ASSIGNMENT OF ERROR.

"The Court of Civil Appeals erred in overruling and refusing to sustain plaintiffs in error's original assignment of error No. 11, objecting and excepting to the judgment of the trial court as follows:

"To the judgment for damages and attorney's fees, because (1) plaintiff not having recovered the full amount sued for, the statute is not applicable in any event; and (2) because the evidence conclusively shows that said policy, even if it is a completed contract, is not a Texas contract, or governed by the Texas statutes authorizing the recovery of damages and attorney's fees as therein provided; that said alleged policy is governed by the laws of the State of Tennessee (or if not, it is governed by the laws of the State of Connecticut); that under the laws of Tennessee and Connecticut no damages, penalty or attorney's fees can be recovered under the

facts of this case, and that to construe said Texas statutes as applying to said policy would be in violation of the Constitution of the United States, and especially of Article I, Section 10, prohibiting the passage of any law impairing the obligation of contract, and of Article 40, Section 1, providing that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and of Section 1 of the Fourteenth Article of Amendment, providing that no State shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." (R. 172.)

#### SECOND ASSIGNMENT OF ERROR.

"The Court of Civil Appeals erred in overruling and refusing to sustain plaintiffs in error's original assignment of error No. 11(e), excepting and objecting to the judgment in favor of plaintiff against defendant, for any amount, because said judgment is in violation of the Constitution of the United States, and especially of Article 1, Section 10, prohibiting the passage of any law impairing the obligation of contracts, and of Article 40, Section 1, providing that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and of Section 1 of the Fourteenth Article of Amendment, providing that no State shall make or enforce any law that shall abridge the privileges or immunities of citizens of

the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." (R. 173.)

### THIRD ASSIGNMENT OF ERROR.

"The Court of Civil Appeals erred in affirming the judgment of the trial court, because this suit involves the validity of a contract, and such affirmation is based on a change in the rule of law or construction of statutes by the highest Court of the State of Texas applicable to such contract, in violation of the Constitution of the United States, and especially of Article 1, Section 10, prohibiting the passage of any law impairing the obligation of contracts, and Article 40, Section 10, providing that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and of Section 1 of the Fourteenth Article of Amendment, providing that no State shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." (R. 173-4.)

### ARGUMENT.

#### I.

Before discussing separately the reviewable questions here raised, we will make some observations applicable to the case as a whole.

Has this Court jurisdiction of the *case* through the presence of a *substantial* jurisdictional question, or more than one such question?

If so, what is the scope of review, under the Acts of Congress, and especially under the Act of February 17, 1922, amending Section 237 of the Judicial Code, construed in *Tidal Oil Co. vs. Flanagan*, decided January 7, 1924?

How should the reviewable questions, jurisdictional and otherwise, be decided on this record,

Reserving for later consideration the Act of 1922, we will first consider this case independent of such Act, thus limiting the immediate discussion to our attack on the judgment for statutory penalty and attorney's fee, on the Federal grounds stated in our first assignment of error heretofore quoted.

These Federal questions were distinctly raised in substantially the same form, and adversely decided, at every appropriate stage of this case under the Texas practice (R. 30, 146, 160, 164); and error was duly assigned on writ or error from this Court (R. 172).

The judgment for statutory penalty and attorney's fee is attacked on three separate grounds: (1) under the full faith and credit clause; (2) under the contract clause: and (3) under the due process and equal protection clause of the Constitution of the United States. If any one of the Federal questions thus raised is substantial, this Court has jurisdiction, however such question may be decided;

and, thus having jurisdiction, this Court may review any question reviewable by Acts of Congress, although such question may not itself sustain the jurisdiction. *Prudential Ins. Co. vs. Cheek*, 259 U. S. 530; *Pierce vs. United States*, 252 U. S. 230; *Jim Fuey Moy vs. United States*, 254 U. S. 189.

The law of a contract is a part of it. And when such questions as we have mentioned are raised under an alleged contract this Court determines for itself, independent of the judgment of the state court, under what law the alleged contract was made, and the obligations, if any, of the parties under it. *Farmers & Merchants Bank vs. Federal Reserve Bank*, 262 U. S. 649; *Georgia Ry. & Power Co. vs. Decatur*, 262 U. S. 432; *Bluefield Water Works vs. Public Service Commission*, 262 U. S. 679; *Bond vs. Hume*, 243 U. S. 15; *Bedford vs. Building & Loan Ass'n*, 181 U. S. 227; *Provident etc. Society vs. Kentucky*, 239 U. S. 114; *New York Life Ins. Co. vs. Head*, 234 U. S. 161; *Supreme Ruling etc. vs. Snyder*, 227 U. S. 502.

Passing for the present the question whether or not the alleged contract on which the judgment of the state court was rendered ever became effective—to be discussed under our third assignment of error—we come to the question, under the law of what state said alleged contract, if valid at all, was made; and further, whether or not the Federal questions presented under our first

assignment of error are not only substantial, but present grounds sufficient for reversal.

## II.

If the alleged contract on which the judgment was rendered was a Tennessee (or a Connecticut) contract, if a contract at all, plainly the application of a Texas penalizing statute was an invasion of the Insurance Company's Federal rights, specially set up and claimed, it appearing that under the *lex loci contractus* no such penalty could be legally assessed. Our position on this subject arises on two separate grounds, which will be presented separately.

(a) As the two policies involved in this suit are merely successive stages of one contract only, it becomes necessary to start at the beginning of the transaction.

The original, or "convertible term" policy, was negotiated and delivered in Tennessee, where the insured then sided (R. 38-49). Although it was payable at the Home Office of the Insurance Company, at Hartford, Connecticut, it does not appear open to question that it was a Tennessee contract, with its obligations governed by the Tennessee laws. *Northwestern Mutual Life Ins. Co. vs. McCue*, 223 U. S. 234. However, as will presently appear, it is not material whether the policy be considered a Tennessee or a Connecticut contract, it being



sufficient that it clearly was not a Texas contract. The statute law of Tennessee and Connecticut having been specifically pleaded by the Insurance Company, it was stipulated on the trial that the statute law of these two states is correctly stated by defendant, but whether applicable or not in this case is a question of law to be determined. (R. 96.)

In said pleading the Insurance Company alleged as follows:

"At the date of the alleged policies involved in this suit there was no statute or law in the State of Tennessee authorizing the recovery of any penalty or attorney's fees in a suit on a life insurance policy where liability is denied in good faith, nor has there been any such statute or law since said date; the only statute on the subject then or since in force being Chapter 141, Act of 1901, passed by the legislature of the State of Tennessee and constituting a public act of said State, a copy of which Act, marked Exhibit "A," is attached hereto and made a part hereof; the statute of the State of Connecticut, constituting the public act of such State, being then, and ever since, substantially the same as the law of Tennessee so far as liability of an insurance company for penalty and attorney's fees in a suit on a policy is concerned. The statute law of the States of Tennessee and Connecticut was as heretofore stated at the dates of the original applications for the alleged insurance policies involved in this case, and such has been the statute law of such states, constituting public acts of said respective states, ever since; all of which defendant is ready to verify." (R. 21.)

Omitting formal parts, the Tennessee statute above mentioned reads as follows:

"Section 1.

Be it enacted by the General Assembly of the State of Tennessee, That the several insurance companies of this State, and foreign insurance companies and other corporations, firms or persons doing an insurance business in this State, in all cases where a loss occurs and they refuse to pay the same within sixty days after a demand shall have been made by the holder of said policy on which said loss occurred, shall be liable to pay the holder of said policy, in addition to the loss and interest thereon, a sum not exceeding twenty-five per cent of the liability for said loss; provided, that it shall be made to appear to the court or jury trying the case that the refusal to pay said loss was not in good faith, and that such failure to pay inflicted additional expense, loss or injury upon the holder of said policy; and provided, further, that such additional liability, with the limit prescribed, shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss and injury thus entailed.

Section 2. Be it further enacted, That in the event it shall be made to appear to the court or jury trying the case that the action of said policy holder in bringing said suit was not in good faith, and recovery under said policy shall not be had, said policy holder shall be liable to such insurance companies, corporations, firms or persons in a sum not exceeding twenty-five per cent of the amount of the loss claimed under said policy: provided, that such liability, within the limit prescribed, shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss or injury inflicted upon said insurance companies, corporations, firms or persons by reason of said suit." (R. 21-22.)

The judgment for penalty and attorney's fees in this case was rendered under Article 4746, Texas Revised Statutes, reading as follows:

"In all cases where a loss occurs and the life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company liable therefor shall fail to pay the same within thirty days after demand therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent damages on the amount of such loss, together with reasonable attorney's fees for the prosecution and collection of such loss."

It does not require argument to show that under the pleadings and evidence here no penalty or attorney's fee could be recovered under the Tennessee statute; and it is not otherwise contended (R. 133). In a broad sense the Tennessee statute is compensatory rather than penalizing; it applies only when a suit is prosecuted or defended in bad faith; and it gives to both parties the equal protection of the law. None of these characteristics are in the Texas statute.

As heretofore shown, on the first trial of this case judgment was rendered on the original or term policy, and although it was beyond dispute a Tennessee contract, judgment was rendered for statutory penalty and attorney's fee, under the Texas statute. Although this judgment was reversed on other grounds, the assignment of error complaining of the application of the Texas stat-

ute to a Tennessee contract was overruled, with various other assignments. *Aetna Life Ins. Co. vs. Dunken*, 204 S. W. 241. This ruling is not now directly involved, but it is mentioned to illustrate the latitudinous manner in which the Texas courts give extra-territorial application to purely local statutes.

This brings us to the question whether or not the second policy, if a contract at all, was also a Tennessee contract, it appearing that it was merely an inchoate or attempted substitution for the original Tennessee policy, under an election attempted to be made under the terms of said original policy, and without modification of such terms. It is plain that a supplemental instrument, executed in exact compliance with the original terms of a contract, is not in any proper sense a new and independent contract, or even a modification of the original contract, although in this case it is clearly not necessary for us to press the argument that far.

This identical proposition was decided in *Bedford vs. Eastern Building & Loan Ass'n*, 181 U. S. 227, holding that all questions as to the validity and obligation of a supplemental contract, executed under an optional privilege granted by the original contract, must be decided by the law under which the original contract was made. *Providence Savings Life Assurance Society vs. Kentucky*, 239 U. S. 103, and *New York Life Ins. Co. vs. Head*, 234 U. S. 149, were decided on the same principle. In the case last cited this Court approves the doctrine that

"all subsidiary contracts made by the parties to an insurance contract are within the contemplation and purview of the original contract, and are not to be treated as independent agreements. This being so, they are inefficacious to alter, change, or modify the rights and obligations as they existed under the original contract of insurance."

In our case opposing counsel, and the Texas courts, have placed emphasis on the admitted fact that the Aetna Life Insurance Company was licensed to do business, and doing business, in Texas, although no Texas representative of the Company ever had anything to do with the transactions involved in this suit. Various Texas statutes are cited, showing how the Legislature regulates corporations, etc. In *New York Life Ins. Co. vs. Head*, *supra*, all such contentions are disposed of by the declaration that they are unsound: "This is so, as the proposition cannot be maintained without holding that because a State has power to license a foreign insurance company to do business within its borders, and the authority to regulate such business, therefore a State has power to regulate the business of such company outside its borders, and which would otherwise be beyond the State's authority. A distinction which brings the contention right back to the primordial conception upon which alone it would be possible to sanction the doctrine contended for, that is, that because a State has power to regulate its domestic concerns, therefore it has the right to con-

trol the domestic concerns of other States. It is apparent, therefore, that to accept the doctrine it would have to be said that the distribution of powers and the limitations which arise from the existence of the Constitution are ephermal, and depend simply upon the willingness of any of the States to exact as a condition of a license granted to a foreign corporation to do business within its borders that the Constitution shall be inapplicable and its limitations worth nothing. It would go further than this, since it would require it to be decided not only that the constitutional limitations on state powers could be set aside as a result of a license, but that the granting of such license could be made the means of extending state power so as to cause it to embrace subjects wholly beyond its legitimate authority." The Court further declares that there is "no support to the contention here presented, which is that a state, by a license, may acquire the right to exert an authority beyond its borders which it cannot exercise consistently with the Constitution. But the Constitution and its limitations are the safeguards of all the states, preventing any and all of them, under the guise of license or otherwise, from exercising powers not possessed."

The undisputed fact shown by the record, that no Texas representative of the Insurance Company had anything to do with the transactions here involved, merely adds superfluous emphasis to our proposition. It being plainly the contract right and duty of the Com-



pany to comply with its original Tennessee contract, when so requested, on the terms and conditions therein expressed, and according to the law under which it was made, it is of no legal concern what appropriate agencies in Tennessee, Connecticut or elsewhere were used in performing or tendering performance of this duty.

In *Security Bank vs. Panhandle National Bank*, 93 Tex. 575, the Supreme Court of Texas, as then constituted (1900), opinion by the late Chief Justice Gaines, applied the rule we have been discussing more broadly than any case heretofore cited. It was there held that a Texas statute regulating foreign corporations had no application to an absolutely new Texas contract made in adjusting and modifying a foreign contract not made under the Texas statute. While this decision is obviously sound, the facts of our case do not require its application, because here there was no change whatever in the terms of the original Tennessee contract, but merely a tender of performance by the Company of the Tennessee contract in accordance with its exact terms. No modification of the original contract was requested or attempted to be made.

(b) The conclusion that the alleged policy on which judgment was rendered, if a contract at all, was a Tennessee contract, and therefore beyond the jurisdiction of Texas legislation, also follows from considerations wholly independent of the fact that it was merely a second stage of the original Tennessee contract.

If the second policy ever became a contract, this occurred when the policy was mailed by the Company's agent at Nashville, Tennessee, to the insured.

Subject to the provisions of applicable statutes, if any (there being none in this case), the law governing a contract—or the “law of place”—is to be determined by the intention of the parties, ascertained under established rules of construction from all the relevant facts. It is beyond dispute that the original, or term policy, was a Tennessee contract, governed by the laws of Tennessee. Not only is there no evidence of any intention to change the law of the contract, but the evidence clearly and affirmatively proves the contrary. The language of both policies, and their attached applications, admit of no other construction. The fact that the insured had voluntarily moved from Tennessee to Texas is irrelevant. He had the right to move, but he had no right or power to change the contract by merely changing his residence. All negotiations were conducted with the Tennessee agent of the Company, who mailed the policy to the insured after it was received from the Home Office at Hartford, Connecticut, where it was payable according to its terms.

Before citing authorities on this subject, we will quote what the Texas Court of Civil Appeals says on the point under discussion.

“Appellant submits the proposition that the court erred in rendering judgment for attorney's fees and

damages for the reason that the policy is neither a Connecticut contract or a Tennessee contract, and that appellee would not, under the facts of this case, be entitled to recover attorney's fees or a penalty under the law of either of those states.

This contention as to the law of these states seems to be correct, but we hold that the policy herein is a Texas contract. Dunken was a citizen of Texas, the claim was payable in this state, and we think it immaterial that the appellant was in Connecticut, or that the application for the policy was made through an agent who resided in Tennessee. Besides this, it was admitted that appellant had a permit to do business in Texas, and was transacting business in this state. By obtaining such permit, appellant subjected itself to the laws of this state. R. S. Art. 4746; *Cravens vs. Ins. Co.*, 50 S. W. 519; *Ins. Co. vs. Villeneuve*, 60 S. W. 1014-17." (R. 132-33.)

This opinion is obviously in error in stating that the second policy was payable in Texas. Both policies were by their express terms payable in Hartford, Connecticut (R. 39, 67). The article of the Texas Statutes cited by the court is the Texas penalizing statute heretofore quoted, and under which the judgment for penalty and attorney's fees was rendered. Of course it cannot furnish its own foundation for extra-territorial jurisdiction. The two cases cited by the court are wholly inapplicable to the question in issue. But, if the fact were otherwise, these cases are no authority here on the Federal questions presented.

We will now cite additional authorities in support of the proposition that the facts that the insured was a citizen of Texas, that the Company had a permit to do business in Texas, and was transacting business in Texas, are irrelevant on the issue under discussion. *Johnson vs. Mutual Life Insurance Co.*, 108 Mass. 407 is also reported in 63 L. R. A. 833, with an elaborate monographic note on the law of place. Opinion by Mr. Justice Holmes, now a member of this Court, then Chief Justice of the Massachusetts Supreme Judicial Court. It appeared that the Insurance Company was doing business in Massachusetts, and that the insured resided there, but it also appeared that the Company was a New York corporation, and that "the contract was made in New Hampshire or New York, it does not matter which." It was held that the Massachusetts statutes were not applicable. In the monographic L. R. A. note under this case, 63 L. R. A. 833, 837, it is stated as the well-established rule—in the absence of other considerations of a controlling character—that when a policy is mailed direct to the insured, the contract is to be regarded as having been made where the policy was mailed. Numerous cases are cited, including *Hartford Steam Boiler Inspection & Insurance Co. vs. Lasher Stocking Co.*, 66 Vt. 439, where the facts were strikingly similar to the facts of our case. The policy was issued by a Connecticut corporation, but it was mailed from a branch office in New

York to the insured in Vermont, and it was held that the contract was made in New York, and not in Vermont.

In *Simon vs. Southern Ry. Co.*, 236 U. S. 115, it was held that state statutes regulating licensed foreign corporations have no application to contracts not arising under such statutes. The Court cites with approval *Old Wayne Mutual Life Ass'n vs. McDonough*, 204 U. S. 22, to the same effect. On the issue under discussion the facts in the case last cited are also strikingly similar to the facts in our case.

"The legislative authority of every state must spend its force within the territorial limits of the state." *Cooley on Constitutional Limitations*, p. 176 (7th Edition).

### III.

Independent of the grounds heretofore considered, that the application of the Texas penalizing statute is extra-territorial, in violation of the constitutional rights of the Insurance Company, the judgment for penalty and attorney's fees is attacked on the further ground that as in this case plaintiff demanded and sued for substantially more than she recovered, the application of the statute violated the Company's constitutional rights. Opposing counsel contend that plaintiff did not demand and sue for more than she recovered. The fact is that she demanded and sued for \$1300.00 more than she recovered, as heretofore fully stated. The amount sued for was reduced by credits alleged and established under defendant's answer, and on which defendant had the

burden of proof. But for such pleading and proof by defendant, plaintiff would have recovered her full demand, if she was entitled to recover anything. And if the Company had not appeared and answered, plaintiff would have been entitled to judgment for the full amount of her demand, sufficiently alleged in her pleadings. It is elementary that the amount in controversy is the maximum for which plaintiff's pleading would support a judgment. *B. & O. S. W. Ry. Co. vs. United States*, 220 U. S. 94.

The latest reported decision on this subject is *C. & N. W. Ry Co. vs. Nye Schneider Fowler Co.*, 260 U. S. 35. Under this case, and the authorities therein given, we submit that the soundness of our proposition is clear. In view of the matters considered in deciding such questions, as shown by the opinion last cited, it is deemed proper to say that in our case no unequal burden rested on plaintiff. On the contrary, all the facts relied on for recovery were in plaintiff's possession, and long before suit the Company had furnished her all requested information in its possession. The unequal burden has been on the Company throughout the proceedings.

The precise proposition here presented, arising under a statute substantially identical in terms, was decided in *Pacific Mut. Life Ins. Co. vs. Carter*, 92 Ark, 378, cited with approval in *St. Louis, I. M. & S. Ry. Co. vs. Wynne*, 224 U. S. 354, where the same conclusion was



reached in applying another statute. These cases fully support our proposition that it would be a violation of constitutional rights to apply such statutes to cases when plaintiff demanded and sued for substantially more than the amount recovered, and when, therefore, the suit was rightfully defended.

In *Fid. Mut. Life Ins. Co. vs. Mettler*, 185 U. S. 308, the statute now under review was sustained under the facts of that case. But none of the objections to the application of the statute here presented arose in the *Mettler* case, and therefore it is not necessary for us to make a general attack on the constitutionality of the statute. However, in the *Mettler* case there was a vigorous dissent; and it later turned out that the whole suit was founded on fraud, and that the court, the jury, and plaintiff's distinguished and honorable counsel, were all imposed upon. The insured had merely contrived a plausible appearance of accidental drowning, but he afterwards turned up alive and in good health, after the insurance money had been collected. *Fid. Mut. Life Ins. Co. vs. Clark*, 203 U. S. 64. It is deemed proper to mention this circumstance as an admonition against freely sustaining statutory premiums on improper or excessive demands, even when counsel act in the utmost good faith; and in our case such good faith is of course not questioned.

It is important that just life insurance claims be paid promptly, as generally they are, even where there are

no minatory statutes. Duty and sound business policy dictate this course. But all claims are paid from trust funds, belonging to policy-holders or stockholders, or both; and plainly such trust funds are also entitled to protection. We should hesitate to sustain the application of a penalizing statute that puts a trustee *in terrorem*, and imposes a severe penalty for the careful and conscientious discharge of obvious duty. But the exigencies of this case do not require us to press that proposition or to review the long line of decisions and dissenting opinions on this subject, and we will not assume a plainly unnecessary burden, or trouble this Court with it. It is enough to say that as the Texas statute is construed and applied in our case it violates the Company's constitutional rights, it appearing that a penalizing statute has been given an extra-territorial effect, and that it has been applied where the Company rightfully resisted an excessive demand, even if it be conceded, for the sake of argument (which is not a fact, as we will show), that plaintiff had a rightful demand for any amount.

Our objections here presented have generally arisen under the due process clause of the Constitution. And it seems that we could safely rely on that clause alone, without invoking other Federal questions. But it also appears that in refusing to recognize the Tennessee and Connecticut statutes, the full faith and credit clause of the Constitution has been violated. Therefore, it is not necessary to invoke the contract clause also, but as this

objection is raised under our assignment of error, we will discuss it briefly.

The Texas penalizing statute here involved was in force when the Tennessee contract was made; and we recognize the general rule that only laws passed after the execution of a contract can be said to impair its obligations, within the meaning of the contract clause of the Constitution. *Mundy vs. Wisconsin Trust Co.*, 252 U. S. 499. But this rule, as we understand, has been announced only in cases where the contract was made under the law in question, construed in recognition of all Federal rights, and where—under the principles and authorities heretofore discussed—the law was a part of the contract, and it could not be said that the obligations were impaired by the very law that gave them life. However, when by unwarranted construction a state court extends the application of a state statute to contracts not arising thereunder, or where the statute itself is so construed as to invade constitutional rights, then the obligation of the contract is unconstitutionally impaired. The contract clause is not prospective in its terms, or in its purpose and policy, although it is generally prospective in its application, for the reasons above stated. And it is now well settled that the obligations of a contract are mutual, on the one hand to perform, and on the other hand to accept performance, in accordance with the terms of the contract, construed by the law under which it was made. Therefore, the obligation of a con-

tract is unconstitutionally impaired by a statute that, as applied in this case, increases such obligation. *Georgia Ry. & P. Co. vs. Town of Decatur*, 262 U. S. 432

We will not further discuss this subject, but in support of the distinction we have sought to draw we refer to the following cases: *City of Los Angeles vs. Los Angeles City Water Works*, 177 U. S. 558; *Louisiana vs. Pillsbury*, 105 U. S. 278; *Douglas vs. Pike County*, 101 U. S. 677; *Shelby vs. Guy*, 11 Wheat. 301; *Georgia Ry. & P. Co., vs. Mayor etc.*, 262 U. S. 441; *Columbia Ry. etc., Co., vs South Carolina*, 261 U. S. 236; *Rooker vs. Fidelity Trust Co.*, 261 U. S. 114.

#### IV.

This brings us to the question whether or not the entire case should be reversed under the Act of Congress, approved Feb. 17, 1922, recently construed in *Tidal Oil Co. vs. Flanagan*, January 7, 1924.

Before discussing our case on the merits we will consider the scope of review under said Act, and the principles that we think should be followed.

(a) We quote from our brief on motion to dismiss or affirm as follows:

"By Act of Congress approved February 17, 1922, amending Section 237 of the Judicial Code (42 Statutes at Large 366) the jurisdiction of this Court, and its authority to review on writ of error to a State court, is extended as follows:

"In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a State applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall, upon writ of error, re-examine, reverse, or affirm the final judgment of the highest court of a State in which a decision in that suit could be had, if said claim is made in said court at any time before said final judgment is entered and if the decision is against the claim so made."

We have found no opinion construing this statute. Whatever may be said of it as a *sole* ground of jurisdiction (*Columbia Co. vs. South Carolina*, 261 U. S. 236, 1923; *Rooker vs. Fidelity Trust Co.*, 261 U. S. 114), it seems clear that when—as in this case—jurisdiction has attached on other grounds, this Court's authority to review is enlarged to the extent stated in the Act. Previous decisions on the scope of review were based on the original statute, and the amended statute first construed by a divided Court in *Murdock vs. Mayor of Memphis*, 20 Wall. 590, followed in many subsequent cases. Where the jurisdiction of this Court is clear, we think that the Congress may extend the scope of review as it may deem proper.

In such cases this Court may exercise its independent judgment on non-Federal questions to the extent authorized by Act of Congress."

The brief from which we have quoted was prepared

before there was any decision construing the Act of 1922. But in *Tidal Oil Co. v. Flanagan*, subsequently decided, this Court seems to have adopted the views at least suggested in our brief, where we intimated a doubt as to sustaining jurisdiction *solely* under this Act.

Plaintiff in error in the *Tidal Oil Co.* case expressly admitted in its brief that "insofar as plaintiff in error, Tidal Oil Company, is concerned, it is conceded that the writ of error may only be sustained under the provisions of the Act of Congress of February 17, 1922."

It appearing that there was no other substantial ground of jurisdiction, and this Court holding that it was not the intention of Congress to make this Act a sole and independent ground of jurisdiction, the writ of error was dismissed; and it was at least strongly intimated that the Congress, under the Constitution, could not thus create a new ground of jurisdiction.

But there was no intimation that the Act of 1922 is unconstitutional as a whole, or that properly construed it is unconstitutional in any of its features. On the contrary, the opinion, at least by necessary implication, sustains the constitutionality of the Act.

The Constitution limits Federal jurisdiction to certain specified classes of cases. But where the jurisdiction exists, on any ground authorized by the Constitution, it seems clear that the scope of review may be extended by Congress to such questions, Federal or non-Federal, as Congress may deem proper. We understand that this



Court has always so held, and to hold otherwise now would render the entire Act of 1922 nugatory.

In our case we submit that it clearly appears that this Court has jurisdiction on other and independent grounds, and therefore any alleged error, duly assigned under the Act of 1922, is reviewable by this Court.

It is not necessary to give this Act a literal construction, and to insist that the right of review exists merely because it is "claimed", in the language of the Act. We expect to show indisputably that such claim is well founded in this case. But if it shall appear that the claim is substantial, and that the judgment of the state court violates fundamental rights, we do not think that we have the burden of demonstrating an express and literal conflict between the decision in this case and former decisions of the Texas courts. Under a former Texas statute the jurisdiction of the Supreme Court, in a certain class of cases, depended, by the express terms of the statute, on showing an actual conflict of decisions. This statute gave infinite trouble, and it was repealed. It was deemed necessary to go beyond the published opinions and examine the records, and the briefs of counsel, to determine what was actually decided in the cases alleged to be conflicting. In the pursuit of this inquiry the merits were frequently obscured, and much unprofitable work was done in undertaking to distinguish between decision and dictum, when there was nothing in the published opinions to suggest such a distinc-

tion. And even where the published opinions indicated no conflict it was sometimes found, by careful re-examination of the records and judgment, that an actual conflict existed.

The Act of 1922 is not so framed,—and we submit that it should not be so construed. In cases not directly under review the published opinions of courts, intelligently read, are what the bench and bar must depend on; and counsel, in advising their clients, must depend on what the courts have declared. But we also submit that the reviewing power of this Court cannot be circumvented by the failure of a state court to overrule expressly former opinions with which the judgment under review is actually in conflict. The Texas “rule of law” in our case is to be found in the final judgment of the state court, read in the light of the entire record now before this Court; but the previous “rule of law” is to be found in the reported opinions of the Texas courts.

We believe that under a proper construction of the Act of 1922, and within its specific limitations, the scope of review, on writ of error to a state court, is the same as if the writ had been directed to an inferior federal court; and that in both classes of cases the reviewable questions should be decided under the same general principles, although even under the Act of 1922 the scope of review is not as broad as it is when the writ is directed to an inferior federal court. But under the Act of 1922, when there is a substantial claim that the judgment under

review, read in the light of the entire record, is in conflict with previous decisions of the state court, thus establishing a "change in the rule of law or construction of statutes," and that the practical effect of such "change" is to deny rights under the Constitution of the United States, this Court will review the question thus presented, and exercise its independent judgment in answering it. Any other construction, it seems to us, would render the Act nugatory.

The opinion in *Tidal Oil Co. v. Flanagan* is decisive on the proposition that the questions presented by our second and third assignments of error were duly raised in the state court, and they are properly before this Court. See also *Cissna v. Tennessee*, 246 U. S. 289; *Casey v. Chapman*, 247 U. S. 102; *Wood v. Love County*, 253 U. S. 17; and especially *American Ry. Express Co. v. Levee*, October 22, 1923.

On the motion to dismiss or affirm no question on this point of practice was raised, and therefore we will not discuss it further.

#### V.

Now we come to the question specifically raised under our second and third assignments of error, whether or not by a "change in the rule of law or construction of statutes" the judgment of the state court deprives the Insurance Company of its property without due process of law, or denies to it the equal protection of the law, or impairs the obligation of a contract.

This case was tried on special issues submitted to a jury over the objections and exceptions of the Company. Having in mind the constitutional limitation of the power of review of facts found by a jury, it is proper to remark that in a great variety of ways the objections were made, and exceptions reserved, and carried through all the proceedings in the state courts, necessary to authorize such review. It seems sufficient, without now going further, to point out that the Company in due form requested the trial court to direct a verdict for defendant (R. 24, duly excepted to the court's refusal to give the charge requested (R. 33). The Company also objected and excepted to the submission of special issues, on the ground that there was no evidence authorizing their submission (R. 33). These exceptions were made the basis of proper assignments of error, which in due form were carried through all the state courts (R. 29, 136, 151, 152).

It has never been contended (and cannot be seriously contended) on the facts shown by this record that plaintiff had any case whatever, in law or in equity, unless the admitted default of the insured was waived by the Company; and all the efforts of plaintiff have been directed to discover something in the record that might be construed as "some evidence" of a waiver. The evidence on this issue is all undisputed and in writing, and its meaning unequivocal. Therefore it is plainly a question of law whether or not it contains any evidence of an intent to waive the default of the insured. The opinion of the Court of Civil

Appeals completely misconceives the undisputed evidence, and ignores the undisputed facts shown by the record. The errors of fact in this opinion (R. 130-133) are so numerous that we will not here discuss them in full, but we respectfully refer the Court to the Company's motion for rehearing in the Court of Civil Appeals (R. 135-147), where these errors are specifically pointed out, with references to the record. We will here mention some of these errors, which we submit are plain and flagrant.

We quote from the opinion of the Court of Civil Appeals (R. 130) as follows:

"The first premium was not paid. But the policy was delivered to the insured by Alexander, with the intention that it should become a completed contract. The evidence as to this not only sustains the finding of the jury as to issue No. 1, but is so complete that we do not deem it necessary to quote from the same."

On this issue there is not even a hint in the record of any evidence, except the letter from Alexander to the insured, March 4, 1916, quoted in full in the opinion of the Court of Civil Appeals (R. 129), and heretofore quoted in full in this brief. That letter was the last communication from Alexander to Dunken; on its face it completely refutes the suggestion of any intention to waive a default; as the same court had expressly held on the first appeal (204 S. W. 241, 243), and Dunken never

replied to the letter. Obviously the Court of Civil Appeals realized that the letter was no evidence of a waiver, otherwise it would not have referred to imaginary evidence "so complete that we do not deem it necessary to quote from the same." Such evidence is "complete" only in the sense that it is completely absent.

We also quote from the same opinion (R. 128) as follows:

"At the time of issuing the new policy the appellant marked the first policy 'Surrendered', so it and the note given for its extension were no longer of any force."

This statement is in direct conflict not only with what the court had said on the first appeal (204 S. W. 241-243) but also with its statement a few lines previously in the same opinion (R. 128), as follows:

"For the purpose of keeping the term policy alive until the conversion could be effected, Dunken executed a note payable March 29, 1916, to the Company, for the amount of the annual premium."

This quotation states the record correctly, it being undisputed that the term policy was to remain in effect to give the insured an opportunity to complete the conversion, not later than March 29, 1916, which gave ample opportunity. In the absence of anything better, great significance is sought to be placed on the fact that when



the second policy was issued at the Home Office, with the expectation that on compliance with the contract it would be delivered in substitution for the original policy, said original policy was stamped "Surrendered". Clearly this was a mere clerical step in the transaction, like the letter from Alexander to Dunken, without any legal effect, unless and until the transaction itself was completed. It was of no more legal significance than signing and acknowledging a deed with the view to its delivery in anticipated performance of a contract. It would seem that no authority would be necessary on so plain a proposition, but the precise point was decided in *McGough v. Women's Catholic Order of Foresters* (Wis.), 185 N. W. 174, 24 A. L. R. 746. From the concluding paragraphs of this recent opinion it appears that all the authorities are in harmony on this proposition; and the learned editor of A. L. R. cites no cases to the contrary. This case denies the contended legal effect of stamping the word "Surrendered" on an existing policy as a clerical step in a contemplated substitution that was never effected. In our case the original policy remained in effect until it lapsed on March 29, 1916, as correctly held on the first appeal.

Of course we realize that this is not a Texas case. We will presently refer to the Texas cases. But when a state court rests its decision on a plainly untenable non-Federal proposition the fact will not impair this Court's authority to review. *Wood v. Love County*, 253 U. S. 17, and many cases there cited.

We will not here discuss the many other erroneous statements and inferences in the opinion of the Texas Court of Civil Appeals, but we again refer to our motion for rehearing therein (R. 135-147), where these errors are specifically pointed out.

On the first appeal of this case (Aetna Life Ins. Co. v. Dunken, 204 S. W. 241-243) the Court of Civil Appeals said:

"In conclusion, it seems to us that the proof shows that the right to recover upon the first policy was by the terms of that instrument forfeited by the failure to pay the note given for the premium at the time of its maturity, unless it shall be made to appear that appellant had waived its right of forfeiture and manifested an intention to keep that policy alive. It also seems equally clear that the second policy never became operative, because of the failure of Mr. Dunken to comply with the terms and conditions upon which it was sent to him unless it shall be made to appear that the appellant intended to waive compliance with such conditions, and treat the policy as valid and binding."

The legal correctness of this quotation is not and cannot be seriously challenged; and it limits the inquiry to the question whether or not there is in the record any evidence legally sufficient to support the theory of a waiver.

We will now undertake to show what the rules of law on this subject have heretofore been in Texas, and how

in legal effect such rules have been changed by the judgment in this case.

Prior to the decision in this case it had been uniformly and clearly held by the courts of Texas, in construing insurance contracts, that in the absence of an applicable statute to the contrary (there being none such here, even if a Texas statute could apply), an insurance contract—like any other contract—is to be construed according to its plain and unequivocal terms; that the provisions for lapse of policies found in this record are valid; that time is of the essence of the contract, when the policy so provides; that there can be no waiver of a default until the default has actually occurred; that the intention to waive must be “unequivocal”, and by due authority; that when the contract so provides, as here, the policy lapses “*ipso facto*, and no act of the Company need be done either to declare it or enforce it”; that the law “in itself presents no remedy against the contract the parties have themselves made”; that a waiver cannot be legally inferred from equivocal circumstances, or the mere probability that an extension would have been granted, or a default waived, on proper application; and that the mere possession of a policy, complete in form, is not alone sufficient to make it binding, when it further appears that the terms of the contract have never been complied with, and that the policy has never been delivered with the intention that it would become effective without such compliance.

It will also appear that the decision in this case is in violation of a plain Texas statute, uniformly upheld heretofore. We mention this, not because any Texas statute has any application to the substantive law of this case, for reasons stated under our first assignment of error (although the Texas court has held otherwise), but because it illustrates the versatility of the court in the selection of statutes, and because this statute is merely declaratory of the common law, as previously declared by the Supreme Court of Texas. We will now cite the Texas authorities on these propositions.

In *Joske v. Irvine*, 91 Tex. 574, it was expressly held by the Supreme Court of Texas, on exhaustive review of the authorities, that a mere scintilla of evidence, or a mere speculation, is not legally sufficient to support a finding of a fact in favor of a party having the burden of proof; and of course in our case the burden of proof on the issue of waiver was on plaintiff. This doctrine has never been disapproved or qualified in any reported Texas case, although it was ignored in our case.

The Texas cases recognize the general rule that when the language of an insurance contract is equivocal, it is to be construed most strongly against the insurer. But this appears to be merely an application of general rules of construction, that in case of doubt a contract is to be construed most strongly against the party who selects its language, and that the general purpose of a contract—which in the case of insurance is indemnity—should be

kept in view in construing its particular provisions. Nevertheless it had been expressly held that when the language of an insurance contract is plain, it is the court's duty to enforce it according to its terms. *Maryland Casualty Co. v. Hudgins*, 97 Tex. 124; *Continental Casualty Co. v. Wade*, 101 Tex. 102.

In *Underwood v. Security Life & Annuity Co.*, 194 S. W. 585-588 (Supreme Court of Texas), this proposition was specifically applied to substantially the same language found in the policies in this record, and in the note maturing March 29, 1916; and it was held that the insurance lapsed on failure to pay the note on or before its maturity.

In *Equitable Life Assurance Society v. Ellis*, 147 S. W. 1152, 152 S. W. 625 (Texas Supreme Court), it was held under the facts of that case that *after* the default had occurred it was waived by due authority. But it was expressly held that "when an insurance policy provides that it shall be forfeited for non-payment of premium before a stipulated date, time is of the essence of the contract, and a failure to so pay terminates it ipso facto, without further action by the Company", in the absence of a waiver of such default. It was also declared that "the sounder rule is, that in such case the waiver of a forfeiture may result from *unequivocal acts* by which, *after knowledge of the forfeiture*, the insurer recognizes the continued validity of the policy, or does some act based thereon." Of course there could not be knowledge

of the forfeiture until after it occurred; and there is in this record not even a scintilla of evidence that after the insurance lapsed any authorized representative of the Company said or did anything in recognition of the continued validity of either policy.

The head-note to *Aetna Life Ins. Co. v. Wimberly*, 102 Tex. 46, which correctly states the decision, is as follows:

"An annual premium fell due on Oct. 1, upon a policy of life insurance which allowed 'a grace of thirty days' for such payment but forfeited the policy for non-payment. Insured died Nov. 1, leaving the premium unpaid. Held that the days of grace expired with October 31, and this was not affected by the fact that October 1, the day the premium became due, fell upon Sunday."

In the above case a judgment for plaintiff was reversed and finally rendered for the Insurance Company by the Supreme Court of Texas. It will be observed that the insured died only one day after the insurance had lapsed, while in our case the insured did not die until more than two months after his insurance lapsed, without taking a single step to have it revived.

In *Aetna Life Ins. Co. v. Hocker*, 89 S. W. 26, a judgment in favor of plaintiff was reversed and rendered in favor of the Company by the Court of Civil Appeals, and the Texas Supreme Court denied a writ of error, thus approving the decision. The head-note reads as follows:



"Decedent applied for term insurance to June 10, 1904, and a 20-payment policy at an annual premium of \$288 from that date. He executed a note for both the term and first year's premium to defendant's local agent, which was placed in the local bank in escrow, to be delivered "when a satisfactory policy for \$10,000.00 was turned over" to decedent by the bank. The premium in the application was fixed at decedent's age when the application was written, instead of at the age he would be on the commencement of the regular policy, and, this being changed without his knowledge, a policy at the new rate was written and mailed to defendant's agents, with instructions to deliver on decedent's signing a correction of the application. The policy was sent to the bank, and decedent, on the day he was killed, authorized G. to transfer the policy to another bank, and then asked another to go to the bank to which he expected it to be changed and get the same; but neither applied to the bank holding the note in escrow for the policy until after decedent's death, when delivery was refused. *Held*, that such facts did not show an acceptance of the policy by decedent, and that *no contract had been consummated.*"

The opinion in the above case shows that there was evidence sufficient to support the conclusion that there had been a constructive delivery of the policy; and there were circumstances indicating that the insured probably would have accepted it and complied with the terms of the contract, but for his sudden death in a shooting affray. We quote from the opinion as follows:

"For this testimony it is claimed that it is sufficient, in view of Hocker's inability to testify to

warrant finding that he had seen the policy and was satisfied with it. It seems to us that Hocker's inability to testify would not aid in establishing a fact that required testimony to substantiate it \* \* \* Conjecture is not proof \* \* \* Under these circumstances we are unable to escape the conclusion that the Company was not bound, and *there was no completed contract so far as the evidence in this record shows.* Summers v. Mut. Life Ins. Co., 75 Pac. 937, 66 L. R. A. 812."

So far as the matters here in issue are concerned, the policies in the Wimberly and Hocker cases, just cited, were in precisely the same form as those in our case.

In the opinion in our case (R. 132) the court says:

"Alexander was not merely an agent of the Company to solicit insurance. He was a state agent, and as such the Company doubtless had confidence in his business ability", etc.

In a proper sense this is true, but the fact is wholly irrelevant because the record shows conclusively that Alexander had no authority to waive and that he had nothing to do with the transaction after the insurance had lapsed; and this paragraph in the opinion is significant only to illustrate to what lengths the court went in searching for a ground to affirm the judgment. However, the applications and policies in this case all expressly provide that "all policies and agreements made by said Aetna Life Insurance Company are signed by one or

more of its executive officers (naming them), and that no agent or other person not an executive officer can grant insurance, or waive any condition of its policies, or make any agreement which shall be binding upon said Company" (R. 45, 46, 76, 77).

Texas Revised Statutes, Article 4968, brought forward from laws of 1909, page 198, section 18, referring to insurance agents, provides that an "agent shall not have the power to waive, change or alter any of the terms or conditions of the application or policy." This statute is merely declaratory of what had previously been decided in *Insurance Co. v. Walker*, 94 Tex. 473. And in a long line of decisions this rule had been enforced. *Washington Life Ins. Co. v. Berwald*, 72 S. W. 436; *Niagara Ins. Co. v. Lee*, 73 Tex. 641; *First Natl. Bank v. Lancaster Ins. Co.*, 62 Tex. 461; *East Texas Fire Ins. Co. v. Perky*, 24 S. W. 1080; *Northwestern Natl. Ins. Co. v. Mize*, 34 S. W. 670; *Railway Co. v. Best*, 55 S. W. 315; *Westchester Fire Ins. Co. v. Wagner*, 30 S. W. 969; *Kansas City Life Ins. Co. v. Blackstone*, 143 S. W. 702.

Of course this rule has no application where the evidence shows that the Company had actually conferred such authority, or that the exercise of such authority had been recognized or ratified by the Company with knowledge of the facts. But it will not be contended that anything of that character is in this case.

On this question the opinion of the Court of Civil

Appeals not only rests on supposititious facts, having no existence in the record, but, holding that Texas statutes are applicable, it not only "changes the rule of construction" of a plain Texas statute, but does this to the extent of the complete destruction of the statute, without mentioning it, although it had been called to the court's attention. In practical effect it overrules all that the Texas courts had previously declared; it is in the face of the elementary rule that limitations on an agent's authority are binding when brought to the attention of any party with whom he deals; it violates the obligation of a contract by refusing to recognize a plain provision under which liability was discharged; and by enforcing liability on a supposititious contract that was never completed it deprives the Company of its property without due process of law, and denies to the Company the equal protection of the law.

In order more fully to show the previous decisions of the Texas courts on various features of this case that may be thought to have some significance, we quote from our brief in the Court of Civil Appeals as follows:

"(a) But, for the sake of argument only, treating policy No. 152775 as a completed contract, it is a receipt for the first premium only, and a receipt is only prima facie evidence of payment, which in this case is overcome by conclusive evidence that the premium was not in fact paid, and the admission in plaintiff's pleadings to the same effect. *McGehee v. Shafer*, 15 Tex. 204; *Swann v. Muschka*, 42 Tex. 334-335; *Pool v. Chase*, 46 Tex. 210; *Brown v.*

Dennis, 30 S. W. 273-274; MacDonnell v. Fuentes, 26 S. W. 792; Stacheley v. Pierce, 27 Tex. 335; Watson v. Miller, 82 Tex. 283.

(b) When an insurance agent, or district manager, personally pays a premium, or personally signs the insured's name to a note on a form furnished by the insurance company, in order to prevent the insurance from lapsing, such agent or manager is acting as the agent of the insured and not of the insurer, and such act is not a waiver by the insurer, especially in the absence of any evidence that the insurer authorized any such act, or knew of it, or ratified it in any way. Saldwusbehere v. Haddock, 48 S. W. 197; Hall v. Krauskopf, 52 S. W. 117; Phoenix Assurance Co. v. Munger Mfg. Co., 92 Tex. 297-303; Hudson v. Compere, 94 Tex. 449; Waters v. Wandless, 35 S. W. 184; Thies v. White Life Ins. Co., 35 S. W. 676; Just v. Henry, 174 S. W. 1012; State Mut. Life Ins. Co. v. Turner, 147 S. W. 625; Amarillo Natl. Life Ins. Co. v. Brown, 166 S. W. 658.

(c) A demand for a premium, not complied with, is not a waiver of further default. Cohen v. Ins. Co., 67 Tex. 1325."

Inadvertently or otherwise, various expressions in the opinion of the Court of Civil Appeals in our case confuse principles that are fundamentally different. When an extension of time is granted *before* default, there is no default to waive if payment is made within the extension period; and this is all that had ever occurred previously in our case. But a reinstatement, or recognition of continued liability, *after* default, is a waiver. This never occurred, however, in our case. The correct distinction is

clearly made in *Equitable Life Assurance Society v. Ellis, supra*. That case states that a waiver is to be encouraged. But if a previous extension or a waiver of a past default, or of several such defaults, may be construed by a jury as an implied agreement to waive future defaults, an insurance company must either adhere mercilessly to the "letter of the bond" or place itself at the mercy of delinquent policy-holders. This is an important distinction, if the insurance law is not to become hopelessly confused by departing from fundamental principles heretofore declared by the Texas courts. Extensions, with or without partial payments, are commonly requested by, and granted to, policyholders; and if this cannot be done without waiving express contract rights, and placing the companies at the mercy of delinquent policy-holders, insurance companies should be definitely advised of this novel, revolutionary and dangerous doctrine.

But, while the facts of this case do not present the proposition, we confidently submit that even if previously there had been real waivers such fact alone would be no evidence of an agreement to waive future defaults. If this is not the law, then the law practically compels insurance companies to be relentless, while the Texas courts have declared that the law is precisely the reverse.

With superfluous but somewhat disconcerting elaboration the Court of Civil Appeals succeeds in making a plausible case in support of the proposition (obviously true, and never denied) that J. L. Endlish was Vice-



President, and that W. H. Newell was Assistant Secretary; that these gentlemen were "executive officers" with authority to waive defaults, they being the only executive officers who had anything to do with the transactions here involved; and, under the terms of the applications and policies, the only persons connected with the transaction with authority to waive any contract provisions. All that Mr. English did was to write the letter of instructions to Mr. Alexander (R. 66), reproduced in Mr. Alexander's letter to Mr. Dunken heretofore copied; and this letter completely rebuts any suggestion of waiver, as correctly held on the first appeal, heretofore mentioned. This letter, written more than two months before any default *could* occur, gives Mr. Dunken the option to complete the substitution of policies with or without a loan, as he might prefer. If no loan was to be made Mr. Dunken was to pay the premium, interest and conversion costs, total \$1,299.97. If the loan was to be made, the net amount of the loan being \$987.00, Mr. Dunken was to pay the difference, \$312.97, execute the loan papers, and return the policy as collateral (R. 66). Where in this letter is it possible to find a semblance of foundation for the court's statement that "this letter does not indicate that the policy was not to be delivered to Mr. Dunken until the loan was made and the premiums paid?" The letter expressly directs Mr. Alexander to "report" the *collection* of the premium (R. 66). By what sort of reasoning can this direction be construed as implied au-

thority to "deliver the pollicy as a completed contract" *without* collecting the premium?

This letter of Mr. English, and the subsequent letters of Mr. Newell declaring that the insurance had lapsed, are absolutely the only letters in the record written by executive officers, or by anybody with a semblance of authority to waive any of the terms or conditions of the contract.

The Court of Civil Appeals (R. 128-133) expresses and implies various propositions of law, the abstract correctness of which need not be discussed, because they are based on mere assumptions of fact that not only have no support in the record but are conclusively refuted by the record.

The opinion assumes that the second policy was delivered as a completed contract, when the letter of Alexander to Dunken heretofore quoted completely refutes the assumption, as expressly held on the same evidence, by the same court, on the first appeal. (See opinion heretofore quoted).

Again assuming, contrary to the record, that the policy had been delivered as a completed contract, the opinion next assumes that the Company acquiesced in such delivery. Not only is there no evidence of such acquiescence, but the only evidence is directly to the contrary. (See letter Newell to Wright, R. 111).

On the unfounded assumptions heretofore mentioned the opinion next assumes that Dunken was without notice

of the actual situation, when the letter of Alexander to him certainly gave ample notice, as correctly held on the first appeal, and no notice at all was necessary as previously held by the Texas courts. (See cases heretofore cited). And if further notice was desirable, it is found in all the correspondence between Alexander and Dunken, and especially in the express terms of the policy itself, in Dunken's possession.

The opinion further assumes that the letter of Wright to Newell, May 5, 1916, not only does not mean what it plainly says, but the exigencies are such that the Court finds it necessary to suggest that "it is evident that some word was omitted by the stenographer", and suggests how the language could be changed to fit the interpretation placed upon it! Aside from the fact that Mr. Wright had no authority to waive any terms of the contract, it is obvious that the phrase "complete the necessary"—which the Court changed—is merely a shorthand statement of intention to observe previous instructions, namely to secure a return of the policy, if practicable (R. 109, 110). It is going to an extraordinary length to say that a letter does not mean what it says, and further that the writer intended without saying so, to convey the meaning that he proposed to disregard the express instructions of his superior officer.

The opinion assumes that an undisclosed waiver lurks in the language of an express declaration to the contrary, as shown by this quotation: "Mr. Newell wrote Mr.

Wright, under date of May 11: 'The insurance has lapsed, and before anything can be done it will be necessary for Mr. Dunken to submit an application for revival'.

The policy could not have "lapsed" if it was never in force, and was not subject for a "revival", if it never had life. Mr. Newell, as an executive of a great life insurance corporation, is presumed to understand the meaning of those words, and to have used them advisedly. *We think this evidence is sufficient to sustain the verdict of the jury on the second issue."*

Even if under the microscope it would appear that the language dictated in routine correspondence lacked meticulous accuracy, it would be sufficient that its meaning was plain, free from ambiguity and correctly understood. But in point of fact the language was accurate, the honorable Court of Civil Appeals to the contrary notwithstanding. As shown under our first assignment of error, both policies constituted successive stages of one contract. At least, that was Mr. Newell's understanding, as "an executive of a great life insurance corporation, presumed to understand the meaning of words." The entire insurance "lapsed" on the failure of Mr. Dunken to pay the note due March 29, 1916, on or before its maturity. *Underwood v. Security Life Ins. Co.*, 194 S. W. 585, 588 (Texas Supreme Court). We will not further notice this juggling of words and phrases for the purpose of reversing their plain meaning.

But the opinion reaches its characteristic climax when discussing a certain answer of Mr. Alexander, a witness for the Company, given to a written cross-interrogatory in a deposition taken at Nashville, Tennessee. The Court presumes first—directly contrary to the record, as we shall see—that the witness answers “evasively”; second, it is presumed, *mirabile dictu*, that this “evasive” witness would have answered “truthfully”; third, it is presumed that a truthful answer would have helped plaintiff to establish a fact where she had the burden of proof; fourth, it is presumed that this series of presumptions establishes the fact; and finally, it is held, contrary to all that the Texas courts had previously declared, as we have shown, that the Company’s liability is thus established.

We could well stop here, except that further inquiry will throw a clear, if superfluous, light on the real character of the “due process of law” that was administered in this case. We quote the Court of Civil Appeals as follows:

“But aside from this, Alexander was instructed by the Vice-President of the Company, in his letter of February 28, to report on the new policy not later than March 31. Also he was required by the rules of the Company to make semi-monthly reports on policies issued through his office. *He said that he made such reports as to the policy in question, but he evaded answering as to what such reports showed. The appellant offered no evidence as to these reports.* In the absence of

evidence to the contrary, it must be presumed that he made truthful reports. If so, the appellant knew a few days after March 31 that the policy had been delivered, and that the premium had not been paid; and it received like information about the middle and about the last of April, 1916." (R. 131).

Even if all this were true, it would be wholly immaterial, the undisputed evidence showing that the policy was never delivered as a completed contract, but only on conditions that were never complied with, and the policy therefore never became a completed contract, as held in the opinion on the first appeal, and as also held on the same proposition in *Aetna Life Ins. Co. v. Hocker*, heretofore discussed, where the opinion was approved by the Supreme Court of Texas.

But what is the truth, as shown by the record, about the matter referred to in the above quotation?

If the answer of a witness is thought to be incomplete or evasive, on a showing to this effect the deposition may be suppressed (*Rotze v. Sinclair*, 176 S. W. 614), but the record contains no objection to the deposition, and the learned court therefore seems to have discovered an artfully concealed motive that had completely escaped the attention of plaintiff's counsel.

Proceeding further, this record shows that on the first trial Mr. Alexander was personally present, and testified in open court, where he was subject to cross-examination. It also appears by the record that all cor-



respondence, reports and other documents referring in any way to the Dunken insurance, in the Home Office and the Nashville office of the Company, were produced in open court, tendered to plaintiff's counsel for inspection; and that plaintiff introduced in evidence, without objection, everything that her counsel considered helpful to her cause. Mr. Bidwell brought the records from the Home Office, and Mr. Alexander brought the records from the Nashville office. In these circumstances a statement of facts at the first trial was prepared and approved (R. 109, 116, 121, 125).

On the last trial it was agreed in open court as follows: "It is further agreed, for the purpose of the record, that either side may read excerpts from the statements of facts made of the former trials of this case, without the necessity of further proving them up" (R. 50). ,

The interrogatory and answer referred to appear in the record, pages 86-87. It appears that Mr. Alexander made only one report on the Dunken insurance, of which he *did* furnish a copy in his deposition, which appears in the record, page 87, the Court of Civil Appeals to the contrary notwithstanding. It appears that all other reports were merely general reports which did not refer to the Dunken insurance because there was nothing further to report on this item. This is fully confirmed by the subsequent correspondence, introduced in evidence, Exhibits 48-51 inclusive, R. 110-112.

Exhibit 37, R. 97-103 inclusive, contains various ex-

tracts from the Company's Book of Rules, and the Court of Civil Appeals here discovers that at stated intervals Mr. Alexander was required to make general reports to the Home Office. Obviously the court intends to convey the impression that the absence of these reports is a suspicious circumstance. However, by examining the interrogatory (R. 86) it clearly appears that Mr. Alexander was asked to attach copies of such reports only as referred to the Dunken insurance, and this request was complied with, as we have shown, and thus the interrogatory was answered fully, clearly and definitely.

On the first trial the written evidence which is now relied on as the sole support of the theory of waiver was offered by the Company, and excluded by the court on plaintiff's objection. On appeal this was held to be error, and the opinion shows that this error was the principal ground for reversal. Of course if these written instruments tended to show a waiver, or if they did not tend to rebut the theory of waiver, the error in excluding them was harmless and no ground for reversal. On appeal the court held that these documents should be admitted "as well as all other admissible evidence" on the issue of waiver. 204 S. W. 241-243. The record here contains such documents, but no other evidence on this issue, admissible or otherwise, is found in the record, and the court is now driven to hold that these instruments mean precisely the opposite of what they state plainly, and precisely the opposite of what in legal effect the

same court held on the first appeal. It is inconceivable that plaintiff's counsel would have objected to these documents if they meant what is now held.

Whatever may be said of this ingenuity and versatility, it is not due process or equal protection of law, and all previous decisions of the Texas Courts cannot be in effect overruled and the obligations of contracts thus impaired and completely extinguished, and new contracts substituted, consistent with the Constitution of the United States, and the Act of February 17, 1922.

## VI.

As we write (March 1, 1924) there are no reported cases construing the Act of 1922 except *Tidal Oil Co. vs. Flanagan*. But, without unduly protracting the argument, we believe that a recent case (*Truax v. Corrigan*) decided prior to the Act, may aid in its interpretation. The facts of that case—which we will not here discuss—illustrate a growing evil, manifested in many ways (as illustrated here), for which the Act of 1922 was obviously intended to provide a remedy that would be more plain, adequate and complete. *Moore v. Dempsey*, 261 U. S. 86, illustrates another phase of this evil in a striking way. But here we are not making a collateral attack on the state court's judgment, which proceeding was sanctioned in *Moore v. Dempsey*.

We quote from *Truax v. Corrigan*, 257 U. S. 312, on writ of error to the Supreme Court of Arizona, as follows:

"Mr. Justice Matthews, in *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064, speaking for the court of both the due process and equality clause of the 14th Amendment, said:

'These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; *and the equal protection of the laws is a pledge of the protection of equal laws.*'

The accuracy and comprehensive felicity of this description of the effect of the equality clause are shown by the frequency with which it has been quoted in the decisions of this court. It emphasizes the additional guaranty of a right which the clause has conferred beyond the requirement of due process."

In *Truax v. Corrigan* four Justices dissented, under the facts of that case, but we find no dissent on the doctrine announced in the above quotation; and the case presented difficulties that are not found here, aside from the fact that the Act of 1922 had not then been passed.

Perhaps the exact scope of the Act of 1922 must be determined in decided cases by "a process of inclusion and exclusion," as has been said in construing the Fourteenth Amendment. But in conclusion we will make some observations applicable to the case here.

We do not contend that under the Act of 1922 this Court is authorized to review a finding of fact by court or jury, when the finding is supported by *substantial* evidence, even

when a question of constitutional right is involved; or that the scope of review extends to non-Federal questions of law *that are clearly separable from questions arising under the Constitution, and not decided in avoidance of constitutional rights.*

But with these qualifications we believe that this Court is authorized to redress the invasion of constitutional rights, seasonably asserted; and that no sort of omission, inadvertance, evasion or circumvention can defeat the reviewing authority of this Court. We believe that a direct decision to this effect would reduce litigation in this court, and others, and aid greatly in maintaining constitutional government in fact.

Unless this view of the law is correct it seems to us that a wide breach is made in the wall of constitutional rights; that the entire Act of 1922 is a dead letter; and that it will become a question whether or not the Constitution of the United States has ceased to be the supreme law of the land. Such a *reductio ad absurdum* is not open to discussion.

Plaintiffs in error therefore pray that the entire judgment of the state court be reversed, with such further order as may be appropriate.

Respectfully submitted,  
W. J. MORONEY,  
Attorney for Plaintiffs in Error.  
JOHN R. MORONEY,  
Of Counsel,  
Dallas, Texas.





Office Supreme Court, U. S.  
FILED  
OCT 15 1923  
WM. R. STANBURY  
CLERK

No. 62

IN THE  
**Supreme Court of the United States**  
WASHINGTON, D. C.

OCTOBER TERM, 1923

AETNA LIFE INSURANCE CO. OF HARTFORD,  
CONN., PLAINTIFF IN ERROR.

VS.

MRS. PEARL STONE DUNKEN, ADMINISTRA-  
TRIX, DEFENDANT IN ERROR.

IN ERROR FROM THE COURT OF CIVIL APPEALS, THIRD  
SUPREME JUDICIAL DISTRICT OF TEXAS, AT  
AUSTIN, TEXAS.

MOTION TO DISMISS WRIT OF ERROR OR AF-  
FIRM THE JUDGMENT OF THE STATE  
COURT, AND BRIEF OF ARGU-  
MENT THEREON.

*W. E. Spell and*  
W. E. SPELL and  
J. A. STANFORD,  
Both of Waco, Texas.

*Attorneys for Defendant in Error, Mrs.*  
*Pearl Stone Dunken, Administratrix*  
*of the Estate of W. J. Dunken, De-*  
*ceased.*

No. 325.

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IN THE

# Supreme Court of the United States

WASHINGTON, D. C.

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OCTOBER TERM, 1922.

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AETNA LIFE INSURANCE CO. OF HARTFORD,  
CONN., PLAINTIFF IN ERROR,

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AUSTIN, TEXAS.

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**MOTION TO DISMISS WRIT OF ERROR OR AF-  
FIRM THE JUDGMENT OF THE STATE  
COURT, AND BRIEF OF ARGU-  
MENT THEREON.**

*To the Honorable Supreme Court of the United States:*

Now comes the defendant in error, by her attor-  
neys, W. E. Spell and J. A. Stanford, and prays this

Honorable Court to dismiss the writ of error granted herein, or affirm the judgment of the State Court, for the following reasons:

## 1.

Because the asserted Federal question finds no support in the evidence, and is made only by pleading.

## 2.

Because the asserted Federal question is so lacking in merit, and devoid of any support in the evidence, as to be, therefore, frivolous.

W. E. Spell and  
J. A. Stanford  
Attys for Deft in Error

**STATEMENT.**

On Dec. 17, 1910, W. J. Dunken, then residing at Nashville, Tenn., applied to H. B. Alexander, state manager for the Aetna Life Insurance Co., for the State of Tenn., for two policies of life insurance for \$10,000.00 each, one a twenty payment commercial policy No. 98321, annual premium \$277.80, and the other a seven year convertible term, policy No. 98322, annual premium \$105.40 (see application, printed Record, p. 44.). Both policies were issued, dated Jany. 28, 1911, and delivered to the assured at Nashville, Tenn. The first named policy is not involved in this suit, except as a part of the history of the transaction; the second or term policy is involved in this suit (see term policy, Rec. p. 39.). The term policy provided, that at any time within five years, without medical re-examination, it could be converted into a twenty payment commercial policy for the same amount, and of the same date, Jany. 28, 1911, by paying the difference in premiums, together with 6% interest on same. In other words the assured was given the right to use the annual premium of \$105.40 paid on the term policy from Jany. 28, 1911, to the date of conversion, in the purchase of a new policy dated back to the same date, Jany. 28, 1911, and to have the annual premiums of \$105.40 so paid on the term policy credited on the corresponding annual premiums on the new policy, so this difference, plus 6% interest, the plain-

tiff in error designated the cost of conversion (see Sec. 10, term policy, Record, p. 41.). The assured made the annual payments of \$105.40 on the term policy for five years up to Jany. 28, 1916. Feby. 19, 1916, the assured made application for conversion of his term policy into a twenty payment commercial policy (see application for conversion, Record, p. 62.). And also signed an extension note for the premium on the term policy due March 29, 1916, to keep it in force until the conversion was made (see extension note, Record, p. 63.). *Also letter to the company 60-61 and 65-66.* The application for conversion, a copy of the extension note, and the term policy were all sent to the home office of the company at Hartford, Conn., where on Feby. 28, 1916, the term policy was marked: "Surrendered—new number 152775—\$10,000.00," and the new policy issued (see *Agreement*, Record, p. 65. + Middle). And said new policy on same day mailed from the home office to H. B. Alexander, state manager, at Nashville, Tenn., for delivery to the assured (see Record, p. 66. *Also 89*). And on March 4, 1916, Mr. Alexander mailed the new policy to Mr. Dunken at Waco, Texas (see Record, p. 66-67). And it was received by Mr. Dunken about March 6, 1916, and retained by him until his death, June 1, 1916, without anybody asking him to return it or intimating to him that it was not in force. *p. 94 Also bottom Also top p. 84* At the time the application for the new policy was made by W. J. Dunken, Feby. 19, 1916, he was a resident and citizen of Waco, Texas (see application, Record, p. 62.). At the time the new policy was issued and delivered to him he was such resident and citizen

of Waco, Texas. At the time the new policy was issued and delivered to W. J. Dunken, payable to him or his estate, not only was he a citizen of Texas, but at said time, plaintiff in error had a permit to do, and was engaged in doing, a life insurance business in this state (see agreement, Record, p. 89. .).

Defendant in error plead the facts in relation to both policies and sought a recovery in the alternative on the one, or the other, that the court might find to be in force, alleging in substance, that if the new policy had not been delivered and became a binding obligation, then the term policy was still in force, for it was understood that it should remain in force until it was converted and the new policy was delivered and became effective (see Record, p. 84. .). *par 8 & 10* Plaintiff in error defended upon the ground, in substance, that the term policy lapsed on March 29, 1916, by reason of the failure of the assured to pay the note for \$106.45, due March 29, 1916, given to extend the 1916 premium on the term policy, and that the new policy was never delivered, except for inspection, etc. (see Record, p. 84. .). *but see p. 6 and 10 p. 10.* Defendant in error recovered on the new policy.



### REMARKS.

In the courts of Texas, plaintiff in error contended that this new policy was a Tennessee contract, or if not, then it was a Connecticut contract, "And that to construe said Texas statute (providing penalties and attorney's fees) as applying to said policy (the new policy) would be in violation of the Constitution of the United States, and especially of Art. 1, Section 10, prohibiting the passage of any law impairing the obligation of contracts, and of Art. 40, Section 1, providing that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and of Section 1 of the Fourteenth Article of Amendment, providing that no state shall make or enforce any law that shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." So it will be seen at a glance the only semblance of a Federal question contended for by plaintiff in error, arises by reason of the Texas courts applying our Texas statutes, governing the question of penalties and attorney's fees to a life insurance policy, which is erroneously assumed by counsel to be either a Tennessee or Connecticut contract. Was the new policy, the one recovered upon in this case, a Texas contract—governed by the laws of

Texas, or was it a Tennessee or Connecticut contract, and governed by the laws of one of those states? This is the only question. Plaintiff in error contends the new policy was a Tennessee or Connecticut contract, because the term policy was such, and that the new policy was the same contract as the old one. That the new policy is a separate, distinct and independent contract from the old one—complete in itself, is apparent from a comparison of the terms of the respective contracts. The old policy was numbered 98322, the new one No. 152775. The annual premium on the old policy was \$105.40, and on the new one \$277.80. The old policy was a ~~term~~ <sup>level</sup> premium temporary policy, without any loan value, cash surrender value, paid up or extended insurance, or annuities for permanent total disability. It was as its name implies "a seven year convertible term policy, for temporary protection," and in no event could it continue in force more than seven years. The only advantage, in addition to temporary protection, it afforded, was, it gave the holder the right to use the premiums paid on it in the purchase of another kind of policy, without medical re-examination, within five years, or with a medical re-examination within seven years. The new policy was what its name implies, "a twenty payment life commercial policy," with a loan value, cash surrender value, non-forfeiting value, extended insurance, and paid up insurance value, also providing for annuities in case of permanent total disability.

The new policy by its own terms makes it a separate, distinct, independent contract complete in itself. Sec. 8

of the new policy reads as follows: "This policy and the application herefor constitute the entire contract between the parties hereto," etc. (see Record, p. ....).

The new policy nowhere even refers to the old one.

As indicated above (p. .... of this motion) both parties to this suit treated the two policies as separate and distinct contracts. The application for the new policy was made in Texas by W. J. Dunken, then a citizen of Texas. The new policy was issued, payable to Dunken, a citizen and resident of Texas, and was actually delivered to him in Texas. At all of which times plaintiff in error was engaged in writing life insurance in Texas under a license from said state to do so under and by virtue of its insurance laws. Evidently the new policy, the one upon which recovery was had, was not the same contract as the old or term policy, but was a separate, independent contract, complete in itself, no part of the old policy and the old policy no part of it.

Art. 4950, Vernon Sayles' Annotated Statutes of Texas, a part of title 71 of our insurance laws, enacted in 1909, reads as follows: "Any contract of insurance payable to any citizen or inhabitant of this state by any insurance company or corporation doing business within this state, shall be held to be a contract made and entered into under and by virtue of the laws of this state relating to insurance, and governed thereby," etc. Again, Art. 4972 of the same title, enacted in 1903, reads: "The provisions of this title are conditions upon which foreign insurance corporations shall be permitted to do business within this state, and any such foreign corpo-

rations engaged in issuing insurance contracts or policies within this state shall be held to have assented thereto as a condition precedent to its right to engage in such business within this state." The new policy was payable to W. J. Dunken or his estate. He was both "a citizen and an inhabitant" of Texas at the time it was issued and delivered to him, and at said time plaintiff in error was a foreign insurance corporation doing a life insurance business in this state, under a permit from this state; and this being true, said Art. 4950 above, declares said policy "shall be held to be a contract made and entered into under and by virtue of the laws of this state relating to insurance and governed thereby," etc. Art. 4741, Sec. 3 of title 71 of our insurance laws, enacted in 1909, provides: "No policy of life insurance shall be issued or delivered in this state, \* \* \* unless the same shall contain a provision substantially as follows: \* \* \* 3. A provision that the policy or policy and application shall contain the entire contract between the parties," etc. Plaintiff in error realizing that this new policy, being issued to a citizen of Texas under the provision of the Texas statutes governing life insurance, would be a Texas contract governed by the laws of Texas, complied with the provisions of the above Art. by inserting in the new policy said provision: "This policy and the application herefor constitute the entire contract between the parties hereto," etc. In the case of *National Live Stock Ins. Co. v. Gomillion*, 179 S. W. p. 671, our Court of Civil Appeals, say: "Art. 4972 (cited above) makes the provisions of title 71, R. S.,

conditions precedent upon which foreign insurance companies shall be permitted to do business in this state, and provides that such companies by doing business in this state 'shall be held to have assented thereto.' The law is a part of every contract. Under the law of this state when a foreign insurance corporation obtains a permit to do business in this state, every provision of title 71 of the Revised Statutes, in so far as applicable to its line of business, becomes a part of its contract to do business in this state. Having accepted said provisions and agreed to be bound thereby, it will not, after doing business under such permit (and without which it could not have any business in this state), be heard to question the validity of such provisions." Such we understand to be the effect of the decision of the Supreme Court of the United States in *Waters-Pierce Oil Co. v. State of Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657. In that case it was contended by appellant that the statute of Texas was unconstitutional, in that it took away "the property and liberty assured by Fourteenth Amendment of the Constitution of the United States," and made "many discriminations between persons and classes of persons." To this the court replied: "The plaintiff in error is a foreign corporation, and what right of contract has it in the State of Texas? This is the only inquiry, and it can not find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the powers of the state over them. What those rights are and what that power is has often been declared by this court." The court quotes with ap-

proval from *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357, as follows: "Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may see proper to impose. They may exclude the foreign corporation entirely. \* \* \* the whole matter rests in their discretion." As a conclusion of this whole matter the court said: "The Statute of 1889 (which was assailed as being unconstitutional), therefore, was a condition upon the plaintiff in error within the power of the state to impose, and whatever its limitations were upon the power of contracting, whatever its discriminations were, they became conditions of the permit and were accepted by it."

The above is the law in the Supreme Court of both Texas and the United States, and was so declared to be the law by both courts long before the new policy recovered upon herein was issued. To recapitulate, the new policy was not the same contract as the old one, and the old one was no part of the new, because: 1. The provisions of the two policies are entirely different. 2. The new policy does not even attempt to make the old one a part of it by even referring to it. 3. The new policy declares that it and the application therefor constitute the entire contract between the parties thereto, necessarily excluding the old policy. 4. Throughout the pleading of both parties in the trial court the new policy was treated as a separate and distinct contract



from the old one. 5. At the time the new policy was issued, the plaintiff in error was then doing business in Texas and said new policy made payable to a citizen of Texas, the old policy was excluded and could not be a part of it, because our statute, 4741, Sec. 3, declares, "the policy and application therefor shall constitute the entire contract between the parties thereto." So the contention of plaintiff in error that the old policy was a Tennessee or Connecticut contract, and that the new policy was the same contract and therefore a Tennessee or Connecticut contract, is visionary and frivolous, and finds no support in the record. Failing in this contention, plaintiff in error also contends that the new policy was delivered in Tennessee or Connecticut, if delivered at all, and was therefore a Tennessee or Connecticut contract, but the term "delivery" as used in the policy means manual delivery and not constructive delivery (see Sec. 7 of new policy, p. . . . of Record). But under Art. 4950 of our Statute set out above, it is unimportant where said policy was delivered. Said new policy was issued on an application prepared by W. J. Dunken in Texas, which showed Dunken to be a citizen of Texas, the policy was payable to him—a citizen of Texas, and at said time plaintiff in error was doing an insurance business in Texas, and it thereby accepted the provisions of our insurance laws that were applicable and same became a part of said policy, and Art. 4950 above, made it a Texas contract, subject to the laws of Texas; and Art. 4746 authorized the recovery of the penalties and attorneys recovered in this case.

As stated above, all the asserted Federal questions in this case grow out of, the recovery of penalties and attorney's fees and are all based on the assumption that the new policy was not governed by the laws of Texas, but by the laws of Tennessee or Connecticut. But when we look at the admitted facts in the light of our statutory provisions applicable, it is clear the new policy was a Texas contract and the question of penalties and attorney's fees is controlled by our Texas statutes, and the numerous asserted Federal questions vanish from the case.

If plaintiff in error contends that our Texas statute governing penalties and attorney's fees is unconstitutional, then, we reply this question is so well settled—foreclosed, as to afford no ground for a writ of error.

See:

Art. 4746, Revised Statutes of Texas.

*Fidelity Mutual v. Metler*, (U. S. Sup.) 46 L. Ed. 922.

*Manhattan Life v. Cohen*, 58 L. Ed. 1245.

*F. & M. Ins. Co. v. Dobuey*, (U. S. Sup.) 47 L. Ed. 824.

*Hartford Life v. Blimo*, 65 L. Ed. 549.

*Williams v. Ins. Co.*, 5 Am. & Eng. Annotated Cases, 403, and note.

And plaintiff in error, at the time it issued the policy in question payable to Dunken, a citizen of Texas, being engaged in writing insurance in Texas by virtue

of its insurance laws, will not be heard to question the validity of such laws.

See:

Arts. 4950 and 4972, Rev. Statutes of Texas.  
*Ins. Co. v. Gomillion*, 179 S. W. 671.

*Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28,  
44 L. Ed. 657.

*Paul v. Virginia*, 19 L. Ed. 357.

*Cravens v. Ins. Co.*, 50 S. W. 519, 53 L. R. A.  
305, 71 Am. State Rep. 628, 178 U. S.  
389, 44 L. Ed. 1116.

*Ins. Co. v. Villeneur*, 60 S. W. 1014-1017.

The only question here is, was the new policy, the one recovered upon, a Texas contract, or was it a Tennessee or Connecticut contract? And this is a question of law as applied to the undisputed facts. That the new policy was a Texas contract, as held by the Court of Civil Appeals and the Supreme Court of Texas, we think is too clear to require extended argument, and if so, then there is no semblance of a Federal question in this case.

Wherefore defendant in error prays that the writ of error herein be dismissed, or that the judgment of the State Court be affirmed.

W. E. SPELL and

J. A. STANFORD,

Both of Waco, Texas,

*Attorneys for Defendant in Error, Mrs.  
Pearl Stone Dunken, Administratrix  
of the Estate of W. J. Dunken, De-  
ceased.*

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IN THE  
**Supreme Court of the United States**

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AETNA LIFE INSURANCE COMPANY ET AL.,  
PLAINTIFF IN ERROR,

VS.

MRS. PEARL STONE DUNKEN, ADMINIS-  
TRATRIX, DEFENDANT IN ERROR,

---

IN ERROR FROM COURT OF CIVIL APPEALS OF TEXAS.

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**STATEMENT OF THE NATURE AND  
RESULT OF THE SUIT.**

*To the Honorable Supreme Court of the United States:  
Counsel for plaintiff in error, having given us no-  
tice that he would likely file no brief, other than the  
one filed in reply to our motion to dismiss or affirm  
the judgment of the State Court, and as such reply  
presents only certain phases of the case, in order  
that this Honorable Court may have a better un-  
derstanding of the entire case, as well as the issues  
involved in our motion to dismiss the writ of error  
or affirm the judgment of the State Court, the de-  
fendant in error here presents her brief covering the  
entire case, as follows:*



The suit involved two life insurance policies for \$10,000 each, issued by defendant company on the life of W. J. Dunken, who died on June 1, 1916, one policy being No. 98322, a seven-year convertible term policy; the other being No. 152775, a twenty-pay commercial policy. Both policies were payable to the estate of the assured. The suit was brought by Mrs. Pearl Stone Dunken, the surviving widow, as administratrix of the estate of W. J. Dunken, deceased. Plaintiff alleged that the defendant company undertook to convert the term policy into a twenty-pay commercial policy, and that the conversion had been effected and policy 152775 had been issued and delivered in lieu of No. 98322, and was in force at the time of W. J. Dunken's death. Plaintiff further plead in the alternative that if the conversion had not been completed and the new policy a binding obligation, then the term policy was still in force, as all parties understood the old policy was to remain in force until the new one became effective (R. par. 8, p. 4). The case was tried first, January 25, 1917, in the court below, the Hon. Geo. N. Denton, presiding, and on the verdict of a jury judgment was rendered for plaintiff for \$14,180.70. On appeal the Court of Civil Appeals of Texas, on account of an error in the charge and the exclusion of certain evidence, reversed and remanded the case (204 S. W. p. 241), but expressly held that the evidence made issues of fact for the jury on the question of waiver as to both of said policies.

On April 28, 1919, the case came on for trial again, Hon. E. J. Clark presiding, who had been appointed to

fill the vacancy created by the death of Judge Denton, and after the evidence was all in, on motion, the court instructed a verdict for defendant on the ground, as the court contended, that there was no issue of fact for the jury.

Plaintiff appealed, and the Court of Civil Appeals of Texas again reversed and remanded the case, again holding the evidence made issues of fact for the jury on the question of waiver (221 S. W. p. 691).

The insurance company presented an application for a writ of error to the Supreme Court of Texas which was refused, and the case came on for trial the third time on June 1, 1921, and was submitted to the jury on special issues, and on the findings of the jury judgment was entered for defendant in error, for \$15,310.50 (R. 26).

### **Charge of Court and Verdict.**

On the last trial the trial court, submitted the case to the jury on four special issues, which with the findings of the jury, were as follows:

*Special Issue No. 1.* Did the agent of the defendant insurance company deliver the new policy, No. 152775, as a completed contract, with the intention that the same should become an effective and binding obligation from the time of receipt of same by the assured, W. J. Dunken? Answer "yes" or "no."

Answer. "Yes."

*Special Issue No. 2.* If you have answered "no" to the first issue, you need not answer the second issue, but if you have answered "yes" to the first issue, then

answer this, the second issue: Was the delivery of said policy as a completed contract, acquiesced in by any executive officer of the defendant company? Answer "yes" or "no."

Answer. "Yes."

*Special Issue No. 3.* If you have answered "yes" to the first and second issues, you need not answer the third, but if you have answered "no" to the first issue, or the second issue then you will answer the third issue, to-wit: Did the defendant insurance company, under all the facts and circumstances in evidence before you in reference to both of said policies, waive its right to forfeit the old policy number 98322, on account of the failure of the said W. J. Dunken to pay the extension note of \$106.45, dated February 29th, 1916, and due March 29th, 1916, at the maturity of said note? Answer "yes" or "no."

Answer. (Not answered.)

*Special Issue No. 4.* From the evidence in this case, what amount do you find will be a reasonable attorney's fee for the services performed by plaintiff's attorneys in this case?

Answer. Three thousand dollars (R. 22-23.)

## PROPOSITIONS BY DEFENDANT IN ERROR.

### 1.

Plaintiff in error being a corporation, capable of acting only through its officers and agents, and having delegated to H. B. Alexander, its state manager for Tennessee, the duty of delivering or supervising the delivery of all policies in his jurisdiction, the act of the said state manager in delivering said policy was the act of the company. And the evidence clearly raising the issues as to whether or not said state manager delivered policy 152775 as a completed contract with intention that it become effective on delivery, the court correctly submitted issue No. 1.

*Continental Casualty Co. v. Bridges*, 114 S. W. p. 170.

*Insurance Co. v. Findley*, 68 S. W. p. 695.

*Woodman v. Carrington*, 90 S. W. p. 921.

*Insurance Co. v. Oliver*, 53 S. W. p. 594.

*James v. Insurance Co.*, 49 S. W. p. 978.

*Manhattan Ins. Co. v. Stubbs*, 234 S. W. 1099.

*Bankers Reserve v. Summers*, 242 S. W. 258.

### 2.

The evidence being amply sufficient to raise the issue as to whether or not an executive officer of the insurance company acquiesced in the delivery of policy 152775, the court was correct in submitting this question in special issue No. 2.

*Aetna Life Ins. Co. v. Dunken*, 221 S. W. p. 691.

*Manhattan Ins. Co. v. Stubbs*, 234 S. W. 1099.  
*Bankers Reserve v. Summers*, 242 S. W. 258.

## 3.

The evidence being amply sufficient to raise the issue as to whether or not plaintiff in error delivered the new policy No. 152775, as a completed contract, with the intention that the same should become an effective and binding obligation on receipt of same by the assured, the court was correct in submitting to the jury special issues Nos. 1 and 2.

*Aetna Life Ins. Co. v. Dunken*, 204 S. W. p. 241.

*Aetna Life Ins. Co. v. Dunken*, 221 S. W. p. 691.

*Aetna Life Ins. Co. v. Dunken*, 248 S. W. 165.

*Manhattan Ins. Co. v. Stubbs*, 234 S. W. 1099.

*Bankers Reserve Ins. v. Summers*, 242 S. W. 258.

## 4.

It is not necessary that there be conflicting evidence in order to present questions of fact. If the evidence is such that different deductions may be drawn from it, then such evidence presents questions of fact.

*Ins. Co. v. Bridges*, 114 S. W. p. 170.

*McCorkle v. Ins. Co.*, 8 S. W. p. 516.

*Ins. Co. v. Davis*, 154 S. W. p. 1184.

*Aetna Life Ins. Co. v. Curley*, 47 S. W. p. 585.

*James v. Ins. Co.*, 49 S. W. p. 978.

*Morgan v. Ins. Co.*, Annotated Cases, Vol. 7, p. 382.

May on Insurance, Sec. 360.

And a question of waiver is always a question of fact.

*Nickerson v. Nickerson*, 12 Atl. 880.

*Robinson v. Ins. Co.*, 38 Atl. 320.

*Savage Mfg. Co. v. Armstrong*, 35 Am. Dec.

P. ....

Cyc. Vol. 40, p. 270.

## 5.

Under the facts of this case, the first premium or initial payment on policy 152775 being the cost of conversion and the 1916 premium, and the policy providing that its delivery shall be a receipt for the first premium, and there being an actual, unconditional delivery of said policy, conclusively establishes a waiver of the pre-payment or pre-settlement of the amount due on the new policy, and plaintiff in error is estopped to show otherwise for the purpose of invalidating the contract.

*Dobyns v. Ins. Co.*, 45 S. W. p. 1107.

Annotated Cases, Vol. 9, p. 218 and note.

Cyc. Vol. 25, p. 726, Sec. 3.

Cyc. Vol. 25, p. 865 and note.

*Griffin v. Ins. Co.*, 36 Pac. p. 113.

*Aetna Life Ins. Co. v. Dunken*, 221 S. W. p. 691.

## 6.

At the time policy 152775 was issued and delivered, the assured being a resident and citizen of this state the same became a Texas contract and subject to the laws of this state. Arts. 4746, 4950 and 4972 Rev. Statutes of Texas.



Appellant, having a permit to do business in Texas, and being engaged in doing business in this state at the time it issued said policy to assured, a citizen of this state, it was subject to the laws of this state prescribing penalties of 12 per cent damages and reasonable attorney's fees.

*Franklin Ins. Co. v. Villeneuve*, 60 S. W. p. 1014.

*Association v. Yoakum*, 98 Fed. 251.

*Craven v. Ins. Co.*, 50 S. W. p. 519.

**Statement, Argument and Authorities Under Defendant in Error's 1st, 2nd, 3rd, 4th and 5th Propositions.**

**I.**

While the two policies herein sued upon evidence separate, entire and independent contracts, neither one any part of the other, yet it is necessary in considering the issues applicable to either policy, to consider the entire evidence. On December 17, 1910, H. B. Alexander, manager for the State of Tennessee at its Nashville agency, took the application of W. J. Dunken for two policies for \$10,000 each, one No. 98321, a twenty pay commercial policy on which the premium was \$277.70; the other, No. 98322, a seven year convertible term policy, on which the premium was \$105.40; both dated January 28, 1911; and the premium on each falling due on same date, January 28 of each year. On the same date the assured settled the 1911 premium on both of said policies by giving his note for \$384.20, being the sum of the two premiums, with \$1.20 interest added, said note payable to the order of H. B. Alexander, manager, at Nashville, Tenn., February 15th. This is a plain note of hand, without any security, or provisions for forfeiture of policies for non-payment of note (Ex. 3. R. 50). For the 1912 premiums it will be observed that on March 25, 1912, nearly a month after the thirty days of grace had expired on February 28, Mr. Dunken paid \$183.20

and made a note payable to the order of Burbank & Alexander, agents of the Aetna Life Insurance Company, for \$204.00, due May 27th, covering the premium on the two policies for the year 1912 (Ex. 4, R. 51). In reference to 1913 premiums, on February 22, 1913, the state manager wrote Mr. Dunken, inclosing two notes, one filled out to extend entire premium for one month, and another blank form of note to be filled out if the assured desired to make a partial payment, leaving it entirely optional with Mr. Dunken to pay or extend a part or all of the premium, and closing as follows: "I am glad to extend unto you any accommodation that you may need from time to time" (Ex. 8, R., p. 54). Also from letter, February 24, 1913, it will be observed the \$100.00 paid is credited, and request made of the assured to sign a blank extension note and return, and Mr. Alexander will fill in the note for the proper amount (Ex. 9, R., p. 55). Also in letter Feb. 28, 1913, Mr. Dunken was informed, the note is made for sixty days, but that he can pay it any time he desires, and closes this letter by saying: "I appreciate the way you take care of your premiums, and I beg to assure you *that any extension that I make to you is always a pleasure*" (Ex. 10, R., p. 55). We did not have the correspondence in full pertaining to the 1914 premiums, but as appears from the notes, on Feby. 12, 1914, Mr. Dunken paid \$70.00 on the premium on policy No. 98322, and executed a note due March 28, for the balance, \$86.30; and paid \$30.00 on premium on policy No. 98321, and gave note due March 28, for the balance, \$250.35 (See Exhibits 12 and 13, R., pp. 56 and 57). Then on

March 31, 1914, three days after the maturity of the notes and three days after the policies had lapsed, according to the face of the notes, Mr. Alexander acknowledged receipt of \$200.00 on the above notes and filled out new notes to mature May 28th, for \$87.50 and \$50.50, respectively (Ex. 11, R., p. 56). While we have not the full correspondence in reference to the 1915 premiums, it appears from Mr. Alexander's letter of March 27, 1915 (R., p. 58), that \$50.00 had been paid on the two premiums and a note given for the balance of the two premiums, \$336.50, due March 30; and it appears from Alexander's letter to Dunken (Exhibit 15, R. p. 58), that \$50.00 had been paid on the \$336.53 note above, and it had been renewed for \$289.40, falling due May 30, 1915. It appears from the above letter, which is not dated, but which we learn from the next letter, marked Exhibit 16, R., p. 59 was written on May 24, that Mr. Alexander inclosed a renewal note offering to extend this note or a part of it, to July 29, 1915. Then on June 8, 1915, six days after the policies had lapsed according to the face of the note, he writes Mr. Dunken again, informing Dunken that he had protected his policy and asking him to sign another extension note and pay \$50.00, and if he could not pay the \$50.00 just now, to sign and return the extension note and he could send the \$50.00 a little later (Exhibit 16, R., p. 59). It will be observed from the next letter, dated June 12, 1915, that Mr. Alexander took care of this note for \$289.40, by signing an extension note for Mr. Dunken and taking care of the matter *personally*, and assures Mr. Dunken it was a pleasure to

do anything he could in the matter, and volunteers to write the company for a loan sufficient to pay up the balance of the premium for the year 1915, and closes by saying, "I hope you will have a fine crop year and that your business will be prosperous in every way, for I feel you so justly deserve all the good things that could come to anyone. With kindest regards, your friend, H. B. Alexander, Manager." (Ex. 17, R., pp. 59 to 60).

The above evidence, covering a period of five years, showing how the premiums were taken care of from 1911 to 1915, inclusive, show the general course of dealing between the defendant, acting through its general manager at Nashville, and the assured, and has a very important bearing on the subsequent transactions, as will be hereinafter pointed out. At this point begins the correspondence looking to the conversion of the term policy into a commercial twenty pay life policy, which is as follows:

"Nashville, Tenn., Feb. 16 1916.

"Dear Mr. Dunken:

"I wrote you on the 29th of January in regard to the conversion of your term policy. I am enclosing herewith a conversion form for you to sign and return to me, and write me a letter as to how to fill it in.

"Perhaps it would be just as good plan for you to convert as of the present date, and if you wish to do this you should sign the blank extension note that I am also enclosing, and return to me, which will give you two months from January 28th before you have to pay anything on the new premium, and then I can allow you to

make only small partial payments along as usual. I appreciate your business and your friendship in the past more than I can ever express to you, and I hope you will continue this policy with me. Of course you have two more years at the same rate on this policy before it expires, but unless you convert it now you will have to stand another medical examination; as it is, no medical examination is required; your policy is incontestible and just as good as gold in every respect. Hoping to hear from you by return mail, and with kind personal regards,

H.B.A.—C.

Yours sincerely,

(Encls.)

H. B. Alexander, Manager."

(R., pp. 60-61.)

"Waco, Texas, Feb. 19, 1916.

"Mr. H. B. Alexander,

"Nashville, Tenn.

"Dear Sir: I am enclosing you the note properly signed, also the application for conversion of my term policy, which I want you to attend to as promptly as possible and write me your acceptance of both by return mail, as I will be away from home after about ten days for several weeks, and want this matter all fixed up before I go. Thanking you for immediate acceptance, I am as ever,

"Wiley J. Dunken,

"302 T-H Bldg., Waco."

(Over.) "P. S.—Where I haven't filled in on the enclosed application you finish it, so both my policies will be the same. Respt., W. J. D." (R., p. 61).



"The Postal Telegraph Cable Company of Texas.

R. 61.

"11 DS. S. 49 Day Letter.

"Nashville, Tenn., 12:03 p. m., Feb. 21, 1916.

"Wiley J. Dunken, 302 T. H. Bldg., Waco.

"Your letter received, with enclosures. Please mail me your term policy at once and advise me by letter if you want the policy converted to date five years back, and if so, do you want the company to loan you sufficient amount to pay difference in back premiums?

"1:22 p. m. H. B. Alexander" (R. pp. 63-64).

"Dunken Realty Co.

New Phone 2091

Old Phone 891

Waco, Tex., Feb. 22, 1916.

"Mr. H. B. Alexander, Nashville, Tenn.

"Dear Sir: Your several letters and telegrams have all come to me, and in answer will say that I want to convert my policy as stated before, but will have to borrow the money, as you have suggested, but I want you to get me off as light as you can, for I have never been so hard up as at this time, and had to get my friend Mr. Freeman to help me out on my other policy, as you already know, but I hope before this year is out that I can get my affairs in such shape that I won't be pressed. As you know I have been loaded on real estate for the last three years, and when the war came on I was caught in the crash, but I am hoping to see some change in the near future. I am placing myself in your hands in this matter, and feel that you will take

the proper care of me. Thanking you for your many past favors, and this one too, I am sincerely yours,

"Wiley J. Dunken" (R. p. 64).

"Morgan G. Buckley, President

Aetna Life Insurance Company of Hartford, Conn.

H. B. Alexander, State Mgr. J. B. Dickson, Cashier.

834 Stahlman Bldg.

Nashville, Tenn., Feb. 24, 1916.

"Mr. W. J. Dunken, 115 S. 5th St., Waco, Texas.

"Dear Sir: I have your letter in regard to the conversion of your policy. I will ask the company to make the conversion to the same kind and date as your other policy, and with the new policy send papers for the loan value, the proceeds to be used on the cost of conversion. In order to protect your term policy in the meantime, in case any delay should occur, please sign both forms of the enclosed extension note and return same to me. This will give us to March 30 to complete the conversion and when the loan is made and the premium paid this note will be cancelled and returned to you. In case I may not get the papers to you before you leave Waco, please let me know where to address you.

D.—C.

"Yours very truly,

(E.)

"H. B. Alexander, Mgr" (R. p. 65).

"Hartford, Conn., Feb. 28, 1916.

*"Concerning No. 152775—Dunken.*

"Mr. H. B. Alexander, Mgr.

"Dear Sir: Enclosed find this policy in exchange for No. 98322, surrendered. We also enclose 1916 renewal and blanket receipt covering premiums to 1916, also loan forms Nos. 378 and 547. Not later than your account of 31st prox., you should report on the new number; increase 1911 premium (on first premium sheet) \$172.30, charging first commissions \$79.46. Increase four renewal premiums (on renewal sheet) \$689.20, charging renewal commissions 5 per cent interest to 28th inst. \$159.38, and report 1916 premium regularly in same account with interest of \$1.39. If the loan is to be made, return the policy to the company with the loan forms properly executed. notifying us that you have collected \$312.97, this amount being determined as follows:

Conversion cost as above.....	\$1020.88
1916 Premium and interest.....	279.09
	<hr/>
	\$1299.97
Deduct net loan.....	987.00
	<hr/>
	\$ 312.97

"Yours truly,

"J. L. English, V.-P." (R. p. 66).

"Nashville, Tenn., March 4, 1916.

"Mr. W. J. Dunken, 115 S. 5th St., Waco, Texas.

"Dear Mr. Dunken: I take pleasure in handing you herewith your \$10,000 commercial 20 pay life pol-

icy converted from seven year term. I also enclose a loan note which must be signed by you, with two witnesses to your signature, whose addresses should be given. Also sign the form 378, which authorizes the company to deduct the 1916 premium from the proceeds of the loan. The amount due now to complete the transaction is \$312.97, which is determined as follows:

Conversion cost .....	\$1020.88
1916 premium and interest.....	277.09
	<hr/>
	\$1299.97
Deduct net loan.....	987.00
	<hr/>
	\$ 312.97

"Please do not fail to send me your policy when returning the above. Thanking you, I remain,

"Sincerely yours.

"H. B. Alexander, Manager" (R. pp. 66-67).

## II.

It is our contention under our 1st, 2nd, 3rd, 4th and 5th propositions above, that it was at least a question of fact for the jury, as to whether or not policy No. 152775 was delivered with the intention of its becoming a binding obligation on delivery. And in discussing this question the acts of Mr. Alexander pertaining to the delivery should be treated as the acts of the company, for Mr. Alexander testified as follows: "It is part of my duties as manager to deliver or supervise the delivery of all policies, and the period of time over which

this has extended has been since I became manager of the company" (R. p. 120).

In the case of *Northwestern Life Ass'n v. Findley*, 68 S. W., p. 695, the court says: "As the association is a corporation, it can act only through its officers and agents, and any officer or agent empowered to act for it in respect to a particular matter is the representative of the association in that behalf, and his acts done within the scope of his powers are binding on the association, although the contract contains a general clause declaring that agents shall have no authority to change the contract or waive a forfeiture. Such provision of the contract must be held to relate to agents who have not authority to act for the corporation *in regard to the matter in issue*, since to hold otherwise would deprive the corporation of the power to transact its necessary business and carry out the objects and purposes of its creation." The above holding is approved in *Ins. Co. v. Bridges*, 114 S. W. p. 170; *Woodmen v. Carrington*, 90 S. W., p. 921; *James v. Ins. Co.*, 49 S. W., p. 978 *Manhattan v. Stubbs*, 234 S. W. 1099. *Bankers Reserve v. Summers*, 242 S. W. 258, and many others to the same effect; in fact we have found no case taking issue with the proposition of law announced in the Findley case above. The record shows Mr. Alexander solicited the insurance, took the application for the original policies, delivered the original policies, and for five years collected the premiums, granted extensions, took premium notes and attended to every detail of Mr. Dunken's insurance, and then conducted

the correspondence resulting in the conversion and delivery of the new policy. There was never a letter passed from Dunken to the home office or from the home office to Dunken, and Mr. Alexander testified that he had authority to do all he did, except he failed to take a receipt for the new policy when he delivered it. In all these matters his acts were acts of the Aetna Life Insurance Company. On March 4, 1916, when Mr. Alexander the state manager mailed policy 152775 from the Nashville agency to Mr. Dunken at Waco, did he intend said policy to take effect on delivery? What are the circumstances that tend to show that he did so intend? We know that the state manager and the assured were close personal friends. They were personally acquainted in Nashville for two years, and in every letter written by Alexander to Dunken, beginning with the one dated May 13, 1912, and closing with the one of date March 4, 1916, the friendship of the two men is apparent. In Mr. Alexander's letter of February 22, 1913, he said to Dunken: "I am glad to extend unto you any accommodation you may need from time to time" (R. p. 54). And in his letter of February 28, 1913, he said: "I beg to assure you that any extension that I make to you is always a pleasure" (R. pp. 55-56). And in his letter of June 12, 1915 (R. p. 60), after telling Dunken that he took the privilege of signing an extension note for him and was taking care of the matter personally, said further, "I beg to assure you that it was a pleasure to do anything I could in this matter."



Then in his letter of February 16, 1916, he said to Dunken: "I appreciate your business and your *friendship* in the past more than I can ever express to you, and I hope you will continue this policy with me" (R. pp. 60-61). Not only was Mr. Alexander a close personal friend to Dunken, but he had confidence in Dunken, and was willing to trust him. The original policies, as well as the new one, provided as follows: "This policy shall not take effect until the first premium hereon shall have been actually paid during the good health of the insured, a receipt for which payment shall be the delivery of this policy." Yet, notwithstanding this provision that the first premium must have been actually paid, etc., Mr. Alexander waived this provision by delivering the original policies, without anything being paid, and took Dunken's note for \$384.70, the amount of the premiums on the two policies, with the \$1.20 interest added, with no security or provision for forfeiture (R. p. 50). The premiums on the original policies were due on January 28; the policies provided for thirty days of grace, and provided in effect, if the premium was not paid within the thirty days, then the policy would cease (Sec. 6, R. p. 40); yet Mr. Alexander waived this provision, for, as shown by the note (R. p. 50), he accepted settlement of the premium on the two policies on March 25, 1912, nearly a month after the policies had lapsed, according to said provision of the policies. Then again on March 31, 1914, Mr. Alexander waived the forfeiture provision of two notes, by accepting settlement of said notes which were due March 27, on

March 31st (See letter and two notes beginning on pp. 56-57). And as shown by letter at bottom of p. 58. Also letter June 6, R. p. 59, and letter June 12, R. p. 60, Mr. Alexander again waived the forfeiture provision of this extension note for \$289.40 by accepting settlement of it on June 9, ten days after the policies were lapsed, according to the face of the note, and not only that, but Mr. Alexander took care of this \$289.40 personally for Mr. Dunken. Not only was Alexander, the state manager, a close personal friend to Dunken, and not only was he willing to trust Dunken, but he was anxious to keep Dunken's insurance; this is shown by the fact of the several waivers of forfeiture as above pointed out; it is shown by the numerous premium extensions made, and even voluntarily made for Dunken, from 1911 to 1916. Mr. Alexander, invariably some time before a premium was due, would write Dunken notifying him of the maturity of the premium, and usually inclosing an extension note; and voluntarily offering to extend a part or all of the premium, as Dunken desired; and the premium for any year was extended willingly and freely and often voluntarily, just as many times as Dunken desired, and Mr. Alexander voluntarily wrote the home office and obtained a loan on policy No. 98321 sufficient to pay up the balance of the 1915 premiums after several extensions had been made (R. p. 60). That Mr. Alexander was anxious to keep this insurance is further shown by his letter of February 16, 1916, in which Mr. Alexander said to Dunken: "I appreciate your *business* and your friendship in the

past more than I can ever express to you, and I hope you will continue this policy with me."

Not only was Mr. Alexander a close personal friend to Dunken, not only did he believe in Dunken and was willing to trust him; not only was he anxious to keep Dunken's insurance, but he knew, that while Dunken had plenty of property, yet, on account of war conditions, he was hard pressed for money. He had all this information from Dunken's letter of February 22, 1916 (R. p. 64), in which Dunken said: "I want to convert my policy as stated before, but will have to borrow the money, as you have suggested, but I want you to get me off as light as you can, for I have never been so hard up as at this time, and had to get my friend Mr. Freeman to help me out on my other policy, as you already know, but I hope before this year is out that I can get my affairs in such shape that I won't be pressed as *you know* I have been loaded on real estate for the last three years, and when the war came I was caught in the crash, but I am hoping to see some change in the near future." On March 4, 1916, at the time Mr. Alexander mailed the new policy No. 152775, from the Nashville agency to Mr. Dunken at Waco, not only was Alexander a close personal friend to Dunken, not only did he believe in Dunken and was willing to trust him, not only was he anxious to keep Dunken's insurance, not only did he know Dunken was hard pressed financially, but he also knew Dunken was his friend, and had implicit confidence in him and was trusting Alexander to take care of him. Mr. Alexander had written the

original policies, had attended to every detail of the insurance for five years. Dunken had always done everything Mr. Alexander had asked him to do. And in his letter of February 22, 1916, to Mr. Alexander, the last one Dunken wrote, he closed as follows: "I am placing myself in your hands in this matter and feel that you will take the proper care of me. Thanking you for your many past favors, and this one, too, I am sincerely yours, Wiley J. Dunken." On March 4th, 1916, at the time Mr. Alexander mailed the new policy to Dunken, he was conscious of the fact that he was responsible for the conversion of policies having been made. He remembered that on February 16, 1916, he had written Dunken advising the conversion, and inclosing a conversion form for Dunken to sign. He knew that the term policy was good for two years longer and that the premium on it was only \$105.40 per annum, but that under his advice and at his request Dunken had permitted him to have it converted into the new policy, and now, as shown by J. L. English's statement, a cash payment of \$312.99 is called for. We think it is equally true that Mr. Alexander felt like he had misled Dunken, as in fact he had; for in Mr. Alexander's telegram dated February 21, 1916, in which he asked Dunken to mail him the term policy at once, he said; "And advise me by letter if you want the policy converted to date five years back, and if so, do you want the company to loan you sufficient amount to pay differences in back premiums" (R. p. 64)?

Dunken replied on February 22, 1916, as follows: "Your several letters and telegram has all come to me, and in answer will say that I want to convert my policy as stated before, but will have to borrow the money, as you have suggested, but I want you to get me off as light as you can, for I have never been so hard up as at this time" (R. p. 64). Mr. Alexander further knew on examination of J. L. English's letter, statement and loan form, that the 1916 premium on policy No. 152775 was provided for in the loan on this policy, and as soon as the forms were signed the company would deduct \$279.09, the premium and accrued interest, for policy 152775 from the loan of \$1020.88 (See Ex. 28, R. p. 82). And he knew further the cost of conversion was provided for in this loan, except \$312.97. Exhibit 28 above shows the loan was to be used in paying the 1916 premium in full on the new policy and the remainder of the loan applied to the cost of conversion leaving a balance of \$312.97. And it is apparent from J. L. English's letter that \$113.92 of this \$312.97 belonged to Mr. Alexander. And he knew further that Dunken had on Feb. 26, 1916, given him his note for \$105.40 with two months interest, amounting to \$106.45, due March 29, 1916, to keep the term policy in force until it was converted (R. 60, 61, 65). And also knew that on Feb. 16, 1916 (R. p. 61), he had written Dunken that if he signed the above note he would not have to pay anything on the new premium until two months from January 28, and then he could allow him to make any small partial payments along as usual. At the same time (on March 4,

1916), he knew that the term policy had been surrendered, converted, and a new one issued in lieu of it and that the value of it, \$527.00, had been used to purchase the new policy and the new one had been sent to him for delivery. He could not suppose the old policy was still in force, for it had been surrendered and converted, and had in fact been marked "Surrendered" (R. p. 65), yet Mr. Alexander knew that Dunken was entitled to the protection afforded by this contract, if not the old policy, then the new one. And as the old policy had been surrendered, and was then in the possession of the home office at Hartford, Conn., marked "surrendered," as it had not only been surrendered, but converted into a new policy and its value \$527.00 been credited to Dunken in the purchase of the new policy, and the new policy sent to Alexander for delivery to Dunken, accompanied by a proposition to loan Dunken \$1020.80 on the new policy, under this state of facts, Mr. Alexander could not have supposed that Dunken was still protected by the old policy. At the same time Mr. Alexander was in fact a true friend to Dunken, he had trusted Dunken many times, and had always found him true as steel, he was anxious to keep this insurance, not only for the profit to himself, but because Dunken was his friend and he was Dunken's friend. And he knew he had been loaded on real estate, and the war came on and he was caught in the crash, and Dunken, his friend, was in distress financially, but was hoping for better things in the near future and doubtless he felt like he had unintentionally wronged his friend, in that, if the term policy



had not been converted, it would have cost only \$105.40 per annum to carry the \$10,000 provided for by it, and that could have been extended from time to time to suit Dunken's convenience, but now he had led Dunken into having it converted, and led him to believe that the company would loan a sufficient amount to pay the expense of conversion, and now here is the statement of J. L. English calling for a cash payment of \$312.97, and he knew Dunken didn't have the ready cash to make this payment. He knew Dunken was anxious to keep this insurance—that for five years he had struggled to keep it—that it (the term policy) had a value of \$527.00 and that in its conversion this much had been paid on the new policy, which he held for delivery. And the closing words of Dunken, his friend, in his letter of February 22, 1916, in which he said to Mr. Alexander, "I am placing myself in your hands in this matter (of the conversion) and feel you will take the proper care of me. Thanking you for your many past favors, and this one, too, I am sincerely yours, Wiley J. Dunken," were still fresh in the memory of Mr. Alexander. Why shouldn't he proceed to deliver the policy? This transaction was not like the ordinary transaction of issuing and delivering a new policy. It was the substitution of one policy for another, and the provisions of forfeiture contained in the policy could have no application. For instance, the policy provides in effect, that it shall not take effect until the first premium is paid, and that the delivery of the policy shall be a receipt for the first premium. The company issued no receipt for the first

premium, but possession of the policy was a receipt. But this policy was actually written on February 28, 1916, and dated back January 28, 1911, the same date as the term policy. And under the provisions of the term policy, on its being surrendered and converted, the assured was entitled to have \$105.40 per annum which he had paid on the term policy applied to the corresponding annual premium of \$277.70 on the new policy, which would leave a balance due on the new policy of \$172.30 per annum from January 28, 1911, to January 28, 1916. In other words, the company in the surrender value of the term policy at the time they issued the new policy had already collected \$105.40 on each year's premium on the new policy from January 28, 1911, to January 28, 1916. The difference between these premiums for five years, with 6 per cent interest added, the company designated "conversion cost," and there is no provision in either of the policies, the application for conversion or any other document that the new policy should not take effect until the conversion cost was paid, and nothing requiring the conversion cost to be paid as a prerequisite to the new policy becoming effective. If the \$277.70 premium on the new policy from January 28, 1916, to January 28, 1917, was a renewal premium, then according to the face of the policy, it was due January 28, 1916 and February 28, 1916, was the last day of grace for its payment, but that was the date on which the policy was issued at Hartford, and mailed to the Nashville agency for delivery to Dunken and by their acts in so doing the company waived the payment of this amount at its

maturity. But aside from all this, at the time Mr. Alexander mailed the new policy to Dunken, he knew that Dunken would sign the loan papers, and he knew this would automatically settle the premium on the new policy from January 28, 1916, to January 28, 1917, and would settle all the cost of conversion except \$312.97, and a good part of this belonged to him individually. Mr. Alexander many times had trusted Dunken for more than this. The record further shows that Alexander stated to Dunken in several letters that the extension note was not to be paid, but was to keep the term policy in effect until the term policy should be converted, and it is admitted the home office had a copy of this note during the time they made the conversion on about February 28, 1916. The home office evidently understood the purpose for which this note was taken. On February 29, 1916, Mr. Alexander returned to the home office the renewal receipt on the term policy for the year 1916 (Exhibit 3 R. p. 46). Mr. Alexander returned this renewal receipt to the home office evidently because he did not expect the note to be paid. As this note was drawing near to its maturity, March 29th, 1916, the home office did not send this renewal receipt back to Mr. Alexander, evidently because they knew the term policy had been surrendered to them and on February 28 they had converted it into a new policy and the new policy sent out for delivery. And the old policy was in their vaults marked "surrendered." For five years the custom of Mr. Alexander had been to notify Dunken of the approaching maturity of a premium or premium

note, and such was made his duty by the book of rules (Exhibit 33 R. p. 85), yet Alexander never at any time intimated to Dunken that this note was maturing or that it should be paid, evidently because he knew the term policy on February 28 had been surrendered, and converted and its value used in the purchase of the new policy, which he had delivered to Dunken. If Mr. Alexander understood the old policy continued in force to March 29th, 1916, the date of the maturity of this note, doesn't it look like he would have notified Dunken of its approaching maturity, or suggested to him in some way that it should be paid, or offered to renew it, as was his custom, or taken care of it personally (only \$106.45), as he had a premium note for \$289 on a previous occasion? We think, evidently, Mr. Alexander, and also the home office, understood that the term policy ceased to exist at the time it was converted, marked surrendered and filed away in the archives of the company at the home office, and the new one issued and sent out in lieu of it. And Mr. Alexander also understood that Dunken was entitled to have his protection continue without interruption, and in order to furnish such protection and keep faith with Dunken he delivered the new policy.

### III.

Again, the book of rules required when an agent was sending out a policy for inspection, that he should take a receipt showing it was not intended as a delivery, but for examination only, and reciting that the premium

had not been paid and that no insurance is to take effect until the first premium has been paid, and recites even this course should be taken very rarely and then with the understanding the policy is to be returned in three days (See Exhibit 32, R. p. 85). Mr. Alexander understood these requirements, in fact the last exhibit was form 359, attached by him to his deposition. If he did not intend this new policy to take effect on delivery, when he mailed it out on March 4, 1916, is it not reasonable that he would have inclosed one of these blank receipts and asked Dunken to sign it and return to him? It might be inferred that Mr. Alexander intended to imply from what he said in his deposition that he sent this policy to Dunken for inspection, but he does not say so. In fact, he testified twice in this case, once in person and the last time by deposition, and he has never testified that he delivered it for inspection or for any purpose other than for it to become a binding obligation. Evidently he didn't send it out for examination, because he knew Mr. Dunken had another 20 pay commercial policy No. 98321, in the same company, of the same date, the same amount, and same kind of policy. Referring to this same matter (R., p. 119), Mr. Alexander says in substance, "but inasmuch as my letter of March 4, 1916, directed Mr. Dunken to return the policy with the papers, and payment, I thought it not necessary to send out said form No. 359, for I deemed it not necessary for any delay in the examination of the policy." In J. L. English's letter to Alexander (R., p. 66), he had said to Alexander, "If the loan is to be made, return the policy

to the company with the loan form properly executed," etc. In Mr. Alexander's letter to Dunken (R., pp. 66-67), he said: "Please do not fail to send me *your* policy when returning the above" (meaning the loan papers executed). These expressions, together with Alexander's statement in his deposition, show affirmatively that it was not delivered for inspection, and that *no* request was made for its return except (with the loan papers executed), as collateral security for the loan. There was no condition imposed upon its delivery, either in Mr. Alexander's letter accompanying the policy or by sending out form No. 359, as the book of rules required him to do, when a policy was not intended to become effective on its receipt by the insured. And this tends strongly to show that Mr. Alexander intended the policy to take effect on its receipt by Dunken. Again, the book of rules requires: "Every policy which has not been delivered must be returned to the company within sixty days after its date," etc. (R., p. 85). This policy was dated back to January 28, 1911, but was actually issued February 28, 1916, at Hartford, Conn., and mailed by Mr. Alexander from the Nashville agency to the assured at Waco on March 4, 1916, and was received in due course of mail by Mr. Dunken about March 6, 1916, and up to the time of his death, June 1, 1916, no agent of the company had ever intimated to him that this policy should be returned. Howard E. Wright was an assistant auditor for the Aetna Life Insurance Company. His headquarters were at the home office of the company at Hartford. The latter part of April and first part of May he was at the Nash-



ville agency auditing the company's books. Vice-president English in his letter to Alexander of February 28, in which the new policy was sent to Alexander, instructed Mr. Alexander not later than his report of March the 31st to report on the new policy (R., p. 66).

Mr. Alexander in his deposition testified as follows: "It is true that I was required to make monthly reports to the home office at the last of each month, and also at that time I was required to make semi-monthly reports, which were made on or about the 15th and 30th of each month. Yes; I made a report to the home office for the months of March, April and May, 1916, and I have copies of such reports, and my report of the 29th day of February, 1916, shows that I returned to the company renewal receipt under Dunken policy No. 98322, and I herewith attach a copy of said report pertaining thereto, and file it as Exhibit No. 1, to this my deposition" (R., pp. 86-87). The Exhibit No. 1 here referred to is on p. 87, and is the same introduced by plaintiff and referred to by us above. It is apparent from the answer of Mr. Alexander, quoted above in reply to our cross interrogatory, that we had not asked him what his February report shows, but what his report for March, April and May on the new policy No. 152775 showed. Of course, he made no report on No. 98322 for March, April and May, because it had been converted and marked surrendered on February 28, and was in the possession of the home office, and on the same date No. 152775 sent to Mr. Alexander, with instructions after that date to report on the new number. After February 29, he couldn't report

on No. 98322, for he didn't have that policy, he didn't have the renewal receipt for it, and, if he obeyed instructions, he had changed his premium sheets to fit the new policy (R., p. 66). But he could report on the new policy, for he had delivered it March 4, 1916; he had changed his premium sheets to fit it, he had both the blanket receipt and the renewal receipt for the new policy at the Nashville agency, and continued to have the renewal receipt to April 28, and the blanket receipt until May 10 (Exhibits 44 and 45, R., p. 108).

And he had been instructed on February 28 to report on the new policy not later than March 31, 1916. He says he made a report for March, April and May, 1916. And if he made them semi-monthly during these three months he made about six reports, but by an artful evasion he avoided attaching these reports, which were called for, and attached one that was not called for, and evaded disclosing what report, if any, he made on the new policy during March, April and May. Mr. Alexander's report, if he made any, to the home office on the new policy during these months, would doubtless have been very material on the issues involved in this case, and particularly his report made about May 15th and 30th would have been of especial interest, in view of the correspondence that passed between the home office and the Nashville agency about this time.

#### IV.

On May 1, 1916, the home office wrote Howard E. Wright, who was at the Nashville agency auditing the

books, as follows: "Referring to vice-president English's letter of February 28th, in which Mr. Alexander was instructed to report the increase premiums under No. 152775—Dunken—in his March 31st report, if he has been unable to make collection, this policy, with the renewal receipts, should be returned for credit. Mr. Daughn has just called my attention to the fact that the 1916 renewal receipt under this number has been returned for credit, and we cannot understand why Mr. Alexander has not returned the policy and blanket receipt covering years 1912 to 1915, inclusive. Please investigate and make full report" (Ex. 48, R., p. 110). The renewal receipt above referred to was not returned and credited until April 28th, as above pointed out by us (Ex. 45, R., p. 108), and Mr. Wright being at the Nashville agency auditing the books, was doubtless the occasion of its then being sent in to the home office. We see from Mr. Wright's reply to above letter, dated May 4, 1916, that he did take the matter up personally with Mr. Alexander and found Mr. Alexander was still holding the blanket receipt, which Wright returned for credit, which was credited May 10, 1916 (Ex. 44, R. p. 108). And in this personal conference Mr. Alexander told Wright that he had sent the policy together with the loan papers to Mr. Dunken at Waco, and that the matter was then in correspondence. The matter *was* really in correspondence, although Mr. Alexander had not written Dunken since March 4, 1916, when he delivered the policy. Dunken had not replied, because Mr. Alexander, in his letter of March 4, to Dunken, had not indicated that these

papers should be signed and the cash payment made speedily, or by any certain time, and on May 4, when he had this conference with Mr. Wright he was still expecting to receive from Dunken the loan paper, executed, and the cash payment, and he had not urged Dunken to hurry up about this payment, doubtless because he knew, while he was good and had plenty of property, at the same time, as Dunken had explained to him in his letter of February 22, he was hard up for ready cash. But Mr. Alexander told Wright in this personal conference that the matter was in correspondence—what matter did he refer to, not the return of the policy, for he had never at any time asked Dunken to return the policy. Not the matter of conversion, for the conversion had already been made and the new policy delivered. He evidently meant the matter of settlement for the new policy. Mr. Alexander doubtless told Wright that he had known Dunken for a good many years; that he was Dunken's friend, that he had many times trusted Dunken, one time for \$384.00, and another time for \$287.00, with no security, and for other amounts, and Dunken had always come up like a man, and done the right thing. We imagine, he further told Wright that the old policy was surrendered and converted into the new one on February 28, and it was no longer in force, and if Dunken had protection after that date it was bound to be by the new policy. And he doubtless further told Wright that he felt like Dunken was trusting him to take the proper care of him (See letter, R. p. 64). And we are sure he said to Wright, substantially, that Dunken had plenty of property—was en-

tirely solvent, but on account of war conditions was scarce of money, and that the only thing necessary was to get him to sign the loan papers and if he could not pay all the \$312.97, let him pay what he can and make a note for the balance and it might be better for someone to see him, and see that the settlement is all properly closed up. Mr. Wright being out for recreation and pleasure, as well as auditing the books, and remembering the pure ozone of a May morning in Texas, or as the company is doing business in Texas and has an agency at Dallas, he may have thought his duties would call him there, so Mr. Wright told Alexander he might go to Dallas in the next ten days, and agreed with Mr. Alexander that he would see Dunken and "complete the necessary." A word or two is omitted; it seems the writer stopped without completing his sentence, or the stenographer omitted a word, but we know he had in mind to finish up something—to complete something. We think it is quite evident Mr. Wright meant to say "and complete the necessary settlement," which would involve getting the loan paper signed, and collecting the \$312.97, or taking an extension for all or a part of it. This letter appears in full on p. 110 of R.

Then on May 11, 1916, W. H. Newell, assistant secretary, wrote Howard E. Wright in reply to above letter and also wrote Mr. Alexander in reference to the same matter and inclosed a carbon copy of his letter to Alexander to Wright (R. Ex. 50, p. 111). The home office had been notified on receipt of Mr. Wright's letter of May 4th, which they doubtless received about May 6th

or 7th, that the Dunken policy No. 152775 had been delivered. In their reply of May 11th, they say: "Referring to your explanation regarding the Dunken policy No. 152775, I undersiand you expect to be in Dallas next week, and I hope you will then be able to return the policy. This insurance has lapsed and before anything can be done it will be necessary for Mr. Dunken to submit an application for revival." It will be noted Mr. Newell has in mind and is talking about policy No. 152775, and says this insurance has lapsed; if it has lapsed, then there was a time when it was valid; this tends to show that he understood that it became a valid obligation on delivery. In his letter to Mr. Alexander of same date, May 11, 1916, (Ex. 51 R. 111) after acknowledging receipt of the blanket receipt covering premiums for the years 1912 to 1915, inclusive, he says: "It appears that the policy on the 20 payment commercial life plan, was issued in exchange for Convertible Term Policy 98322, and in view of the fact that you have been unable to make collection, the policy (152775) should be returned." It will also be noted Mr. Newell in neither of his letters makes any objection to the policy having been delivered, expresses no surprise at its having been delivered. Does not ask for its return on the ground that it was wrongfully delivered but says to Mr. Alexander, inasmuch as you have been unable to make collection the policy (152775) should be returned. In fact, we believe that Mr. Newell, the assistant secretary, recognized that this policy was rightfully delivered. We do not believe this transaction came under the rules of the company governing the ordinary proced-



ure of issuance and delivery of policies. Mr. Dunken was rightfully in possession of policy No. 98322, and at a time when it was as good as gold, exchanged it for another, why should not the one for which it was exchanged be delivered? There was no provision anywhere requiring the difference to be paid before the exchange was completed. But a very notable fact about the above correspondence is that it stopped short on May 11th. The home office on May 11th knew the new policy had been delivered and was in possession of Dunken. And on May 11th the home office wrote Mr. Alexander that it should be returned. It does look like Mr. Alexander would have replied to this letter before June the 1st, the date of Mr. Dunken's death. And it does look like that if Alexander had ignored this request for the return of the policy, that the home office would have again reminded him of this very important matter before June 1st. We don't know whether this was the end of the correspondence or not, but it is very reasonable to suppose that Mr. Alexander did reply to Mr. Newell's letter of May 11th, and gave the home office a satisfactory explanation as to why he delivered the new policy and should not ask for its return, for we know that no request was ever made by Alexander, Wright or anyone else for the return of this policy up to the time of Mr. Dunken's death, June 1st. Mr. Dunken knew nothing about the above correspondence between the home office and the Nashville agency. This policy was delivered to Dunken about March 6, 1916. He believed it was what it purported to be, a valid policy. He placed it in his safe with his other valuable

papers and no one, up to the time of his death, had ever intimated to him that it should be returned or that it was not a valid policy.

On March 6th, the company, through its manager of the Nashville agency, delivered the new policy, accompanied by loan papers, offering to loan Dunken \$1020.88 on this policy, also rendering a statement charging Dunken with a balance of \$312.97. This proposition was never withdrawn, but was still standing at the time of Dunken's death. Suppose on May 15th, 1916, Dunken had signed the loan papers and returned them, together with the policy, as collateral security, and a draft for \$312.97, is there any doubt but that the company, through Mr. Alexander, would have accepted the settlement? Or suppose Mr. Dunken had not died, and on June 1st, he had executed the loan papers and returned them, together with the policy as collateral security and his draft for \$312.97, is there any doubt that the company, through Mr. Alexander, would have accepted such settlement? Would they not have been legally bound to accept it? Their proposition was still standing. There was no time limit on signing the loan papers and paying the \$312.97. Dunken had accepted the policy on or about March 6th, believing it valid. If he had continued to live and the company had sued him for the amount due, he would have been estopped to deny his liability. As shown by the company's book of rules, also Form 359, if a policy was being sent out for any purpose other than with the intention of it becoming effective, the company was very particular to

require a receipt, expressly reciting that the policy was delivered only for examination, and that the premium had not been paid, and that the policy should not take effect, and should be returned in three days; but in this case, the company, through its general manager, knew this policy was unconditionally delivered on March 4, 1916, and through their auditor they knew on May 4, that it had been delivered on March 4th, and through Mr. Newell, assistant secretary at the home office, they knew on May 11th that it had been delivered by Mr. Alexander on March 4, and that Mr. Dunken had it and was relying upon it for protection, yet none of them ever intimated to Mr. Dunken that it was not in force, or that it should be returned. And none of them ever intimated to Dunken that it was delivered "for inspection," or "provisionally"; this was evidently an afterthought, for the first time we hear of such a suggestion is in defendant's answer filed in this case. No such suggestion is contained in the correspondence above between the Nashville agency and the home office. On May 11th, Mr. Newell, in his letter to Wright, does say it has lapsed, but whether or not it had lapsed depends not upon what Mr. Newell said in this letter, but upon the law as applied to the provisions of the policy. Now, we ask this Honorable Court to read carefully Mr. Alexander's letter of March 4, and see if there is anything in it that would indicate that Alexander did not intend the policy to take effect on its receipt by Dunken. Twice in this letter he refers to the policy as "*your policy.*" Again he says, "*I take pleasure in handing it*

to you." Again he says, in effect, it is a policy *converted* from seven year term; not in process of conversion, not will be converted when settled for, but *converted* from seven year term. True, he said he inclosed a loan note that Dunken must sign, but does not say when; also form 378, but suggests no time limit for this to be done. He does say: "The amount due now to complete the transaction is \$312.97," but he does not say, nor intimate, that it should be paid now, nor that its payment is a prerequisite to the policy becoming effective. He does say, in effect, when returning the above (meaning loan papers) do not fail to send me your policy (meaning as security), but does not suggest when this should be done. Appellant concedes Dunken was entitled to protection up to March 29, for \$10,000 insurance, and if so, does it not necessarily follow that he was entitled to the possession of a policy to evidence such contract? He could not possess the term policy, because it had ceased to exist, had been surrendered and converted and was rightfully in the possession of the home office marked "surrendered," so it necessarily follows he had to look to the new policy.

#### V.

Suppose under the facts of this case, Dunken had died on March 20, 1916, and the widow had brought suit on the term policy alone, do you suppose the company would have admitted the term policy was in force up to March 29th? No, they would have answered that on February 28th the term policy was surrendered and

marked surrendered, and if we had plead nothing in reply, when Mr. Bidwell came down from the home office with the term policy marked "surrendered," we would have gone out of court. And if we had replied setting up the facts as they exist in this case, then the company would have replied, it is true you gave the note for \$106.45, for the premium on the term policy due March 29th, but it was understood the note would keep the term policy alive only until it was converted, and it was converted into a new policy on February 28th, and the new one sent out and ready to be delivered on March 4th, and that the note and term policy then ceased to exist, and so we were not entitled to recover on the term policy. And that we were not entitled to recover on the new policy because it had not been settled for, and so as to the new policy, exactly the same issues would have been involved. Can it be held that the mere inclosing of the loan papers, and the statement showing a balance of \$312.97 due by Dunken, with the new policy, imposes a limitation upon the delivery of the new policy? That there was a manual delivery of the new policy intentionally made by the proper officer of the company on or about March 6, 1916, cannot be denied. That all of the conditions or limitations, if any, on such delivery are contained in Alexander's letter of March 4th cannot be denied, for he said so himself (see middle p. 88 R.). That there are no conditions or limitations to the delivery, is self-evident (see letter March 4, 1916 R. pp. 66-67). If Alexander had delivered it on condition, the loan papers were signed and the \$312.97 paid, does it not

look like he would have said so in this letter? If he had intended the policy not to take effect, unless the loan papers were signed and the payment made by some certain date, does it not look like he would have so stated in this letter? If it had been his intention, that the policy should not take effect, does it not look like he would at some time before Dunken's death on June 1st, have asked him to return it, and especially, after the home office on May 11th requested Alexander to return it? And if Mr. Alexander had not replied to the letter of May 11th, and convinced the home office that the policy was properly delivered, and that Dunken had a right to its possession, does it not look like the company, through some of its other agents, would have seen or written Dunken and asked for its return? And does it not look like Mr. Alexander, who was so anxious to keep the insurance, and who was so great a friend, and who knew Dunken was trusting the matter to him implicitly, would have at least notified Dunken that it was necessary to sign up and return the loan papers, and secure an extension of the \$312.97? We believe Mr. Alexander was sincere in his friendship for Dunken, that he had confidence in Dunken and appreciated his friendship, and appreciated the fact that Dunken was trusting him implicitly in this matter, and we are convinced from this record, if Alexander had thought that it was necessary for Dunken to sign the loan papers and arrange the \$312.97 before the policy became effective, Alexander would have so notified him and given him a chance. It would not have cost Dunken anything to sign the loan



papers and he could have extended the \$312.97. And the fact Mr. Alexander did not so notify him, and the fact that he refused to ask for the return of the policy, even after the company instructed him to return it on May 11th, shows almost conclusively that he delivered it with the intention of its becoming effective on delivery, and that he understood it was in effect and that he had no right to ask Dunken for its return.

## VI.

We believe that under the law as applied to the admitted facts of this case, the company is conclusively estopped to deny the validity of this policy. The policy (152775) was a contract between the company and Mr. Dunken, complete in itself, duly executed by the proper executive officers and sent out to the proper officer for delivery. The contract provides: "This policy and the application herefor constitute the entire contract between the parties hereto and it shall be incontestible from its date of issue except for non-payment of premiums" (Sec. 8, back p. 69 R.). Again the contract recites: "This policy shall not take effect until the first premium hereon shall have been actually paid during the good health of the insured, a receipt for which payment shall be the delivery of the policy" (Sec. 7, back p. 69 R.). The company selected the language in which to express its contract, it was binding on Dunken and equally binding on the company, and in ascertaining what the contract was we are by the contract itself, confined to the policy (152775) and the application therefor. The contract makes a wide distinction between a renewal premium

and the first premium. All premiums after the first are renewal premiums. The contract also provides if a renewal premium is not paid within thirty days after its maturity the contract shall cease and determine, and further provides that no renewal premium shall be considered paid unless there is delivered to the insured a receipt signed by the secretary or assistant secretary of the company, and countersigned by the agent. This is all very proper, because the policy is in the possession of the assured, and the delivery of the policy is in no way connected with its payment. But there is no provision for a forfeiture for failure to pay the first premium, no receipt is provided for the first premium, no necessity for either, because the policy is in the possession of the insurer and its delivery is involved in the payment of said first premium, so the contract provides, the delivery of the policy shall be a receipt for the first premium. This plain provision of the contract was written by the defendant, and was equally binding on both parties. What is meant by the first premium? Evidently the initial payment, the amount due on the delivery of the policy. What was the first premium on policy 152775? If we were to look at the company's premium sheets, we would say it was \$172.30, the balance of the 1911 premium (see English's letter, p. 66). If we were to look at the company's two receipts, one called the blanket receipt, covering the difference in premiums from 1911 to 1915, inclusive, and the other called a renewal receipt, covering the 1916 premium, then we would say there was no first premium. If we apply the

contract (152775) to the facts as they existed at the time it was actually executed and ready for delivery, and we can do this without doing violence to the contract, then the first premium was the cost of conversion and the 1916 premium, it was the initial payment on the amount due when the contract was delivered, and the delivery of the contract is made the receipt for this initial payment. It is immaterial what the first payment was on this policy, the delivery of the policy operated as a receipt for such payment and conclusively establishes a waiver of the pre-payment of such amount.

In the case of *Dobyn v. Insurance Co.*, 45 S. W., p. 1107, cited above, the court says: "So the all controlling question in this case is, can the defendant defeat plaintiff's recovery by proving that as a matter of fact Mr. Dobyns never paid the assessment or premium, notwithstanding the formal acknowledgment of payment thereof in the policy or certificate. Upon authority, the analogies of the law, and reasons of sound public policy, we think not. \* \* \*"

The usual rule is that a receipt is only *prima facie* evidence of payment, and may be explained; but this rule does not apply when the question involved is not only as to the fact of payment, but as to the existence of rights springing out of the contract. With a view of defeating such rights, the party giving receipt cannot contradict it.

Chancellor Kent, in his Commentaries, says: "The receipt of the premium in the policy is conclusive evidence of payment, and binds the insurer, unless there be

fraud on the part of the insured" (3rd Kent. Com., p. 260). "The Supreme Court of Illinois, in *Insurance Co. v. Wolf*, 37 Ill., p. 354; *Ins. Co. v. Fennell*, 49 Ill., 180, and *Insurance Co. v. Anderson*, 77 Ill. 384, holds that insurance companies, on the ground of public policy will be estopped from proving, for the purpose of avoiding the contract, that the premium acknowledged in the policy to have been paid, was not in fact paid. To the same effect see *Fellows v. Ins. Co.*, 2 Dins. 128; *New York Cmt. Ins. Co. v. Natl. Protection Ins. Co.*, 20 Barb. 475; *Dalsell v. Mair*, 1 Camp. 352; *Fay v. Bell*, 3 Taut, 493; Marsh on Insurance, p. 335. These decisions are in harmony with the rulings of this court, and the great current authority in the United States." Cyc. Vol. 25, p. 730, lays down the following rule: "If the first premium on a life insurance policy is in fact not paid, an acknowledgment of payment in the policy, so far as it is merely a receipt for money, is only *prima facie* evidence, and the amount may be recovered; but so far as the acknowledgment is contractual, it cannot be contradicted, in the absence of fraud, at least after unconditional delivery of the policy, so as to avoid the contract on the ground of non-payment." The same rule is laid down in Annotated Cases, Vol. 9, p. 218, and note, Cyc., Vol. 25, p. 726, Sec. 3, and Am. & Eng. Ency. of Law, Vol. 19, p. 55.

Plaintiff in error in the higher courts of Texas undertook to distinguish this case from those in which the recital of the consideration is contractual. But is not the evidence of payment of the first premium on this

policy made contractual? The contract provides the delivery of the policy shall be the receipt for the first premium. This provision is a part of the contract. If Mr. Dunken had paid the first premium and failed to get possession of the policy, they could have said the contract provides the delivery of the policy shall constitute the receipt for the first premium, and as you have not the policy, therefore you have no receipt. Plaintiff in error also virtually admits the rule of law as we contend, but says, "It has no application, the policy was not delivered, absolutely and with due authority." But the contract (152775) says, the delivery of the policy shall constitute the receipt, and the contract does not require that it shall have been "delivered" absolutely and with due authority. The contract evidently means just what it says, the delivery of the policy to the insured. But was not this policy delivered absolutely? There is no limitation shown by the record. Was it not delivered with due authority, the corporation had delegated that authority to Mr. Alexander, they had no one else in his jurisdiction through whom they could act in the delivery of policies.

The state manager was familiar with the provisions of policy No. 152775. The fact that he delivered it unconditionally, knowing that its delivery constituted a receipt for the first premium or initial payment shows conclusively that he intended it to take effect on its receipt by the assured. All of the above evidence is not only sufficient to raise the issue as to whether or not the state manager delivered this policy intending it to become effective on its receipt by the assured but it is almost conclusive that such was his intention.

## VII.

And is it not almost equally conclusive that an executive officer of the company acquiesced in such delivery. Vice-president English was an executive officer. At the time he cancelled the old policy No. 98322 and marked it "surrendered" (R., p. 65, also R., p. 126) and issued the new policy and mailed it out to the state manager on February 28, he had a copy of the note for \$106.45 before him (R., middle p. 84). He also had the application for conversion. He knew the note which was not due until March 29th, 1916, was sufficient to keep the old policy in force until March 29th. He knew Dunken was entitled to protection in any event, until March 29th. He knew the old policy could afford Dunken no protection after February 28th because he cancelled it and marked it "surrendered" on that date. He knew that while Dunken was entitled to protection that he was entitled to the possession of a policy to evidence such protection. He knew the company was offering to loan Dunken \$1020.00 on the new policy. He knew delivery was essential to give it any value. Hence his letter of February 28 indicates it should be delivered. At least there is nothing to indicate otherwise and the state manager, under all the circumstances, evidently construed this letter as indicating the policy should be delivered. In this letter (R., p. 66) Mr. English instructs Alexander to report on the new policy not later than March 31st. Mr. Alexander did make reports—semi-monthly reports for March, April and May. We asked him to attach copies of these reports to his depositions, which he failed



to do (see R., p. 87). The presumption is Mr. Alexander did his duty. And if so, then in his reports of March 15, March 30, April 15, April 30, May 15 and May 30, he reported to the company the delivery of this policy as early as March 15th or March 30th. W. H. Newell, the assistant secretary, was an executive officer and we do know that Mr. Newell, as early as May 11, 1916, knew that the new policy 152775 had been delivered to Mr. Dunken on or about March 4 (see R., p. 111), and we know that if Mr. Alexander followed the instructions of J. L. English, vice-president, then Mr. English, another executive officer, as early as March 30th, knew this new policy had been delivered to the assured on or about March 4th, yet Mr. English nor Mr. Newell, nor any other agent or executive officer ever protested, objected or intimated that the policy was not rightfully delivered. And none of them ever requested Dunken to return the policy. By failing to make any protest or objection, knowing the policy had been delivered, and by failing to ask for its return, did not these executive officers acquiesce in the delivery of the policy? We believe all of the evidence, as above pointed out, is not only sufficient to raise the second issue submitted to the jury, but is amply sufficient to sustain the finding of the jury in response to special issue No. 2. The real issue made by the pleadings in reference to policy No. 152775, was whether it was delivered as an executed instrument with the intention that it should become an effective and binding obligation on its receipt by the assured; plaintiff so alleged (see last part Sec. 7 of Petition R., p. 4). Defendant denied it was so delivered; and alleged it was delivered

only "provisionally" for "inspection" (see p. 10). That there was an actual, manual, unconditional delivery of said policy is conclusively shown by all the evidence. Alexander testified that all the conditions to the delivery of said policy were contained in his letter of March 4, 1916. That there were no conditions in said letter is self-evident. That Dunken accepted it as a duly executed and delivered instrument and relied upon it to the day of his death for protection, and that no officer or agent of the company ever at any time asked him for its return or intimated to him that it was not binding, is conclusively shown by all the evidence. The physical possession of the policy by the insured is *prima facie* evidence of its delivery and acceptance with the mutual intention that it would take effect as a completed contract. *Bankers Reserve v. Summers*, 242 S. W. 258. There is no evidence in the record to rebut this presumption. No agent or officer of the company ever intimated during Dunken's life time that it was not properly delivered. The presumption arising from the fact that Dunken had possession of the policy at the time of his death, that it had been delivered and accepted as a binding obligation, is strengthened and corroborated by the entire record in this case, and by all the circumstances and the very nature of the transaction; and the fact that the policy was in the possession of the assured for nearly three months from about March 6th to the day of his death, June 1st, without anybody questioning its delivery, is a strong circumstance tending to show it was rightfully delivered and that the company acquiesced in its delivery. Nobody ever questioned its delivery until after Dunken's death and the

company was called on to pay. The court was correct in submitting special issues 1 and 2.

**Statement, Authorities and Argument Under  
Appellee's 6th and 7th Propositions.**

Policy 152775, the one recovered upon, is a separate, distinct, complete and independent contract from policy No. 98322. The only connection was, the value of the old policy, \$527.00 was used in the purchase of the new one. At the time the new one was issued and delivered to Dunken, he was a citizen of this state residing at Waco, and at said time plaintiff in error had a permit from this state to do, and was doing business in Texas (see Admission, R. p. 89). All of which is found by the court and not excepted to by plaintiff in error (see Judgment, R., p. 28). Article 4746 of Vernon Sayles Statutes applies to foreign as well as domestic insurance companies. In fact as originally enacted this statute applied only to foreign companies (see Art. 4746, also see *American Natl. Ins. Co. v. Collins*, 149 S. W., p. 554). Plaintiff in error at the time policy 152775 was issued and delivered to Dunken, having a permit to do business in Texas, and being so engaged, and the policy being issued to the assured a citizen of this state, the same was subject to the laws of this state prescribing penalties of 12% damages and reasonable attorney's fees (see: *Franklin Ins. Co. v. Villeneuve*, 60 S. W., p. 1014; *Association v. Yoakmen*, 98 Fed. 251; *Crawens v. Ins. Co.*, 50 S. W., p. 519). The fact that defendant in error did not recover the full amount of the policy 152775 is immaterial. Plaintiff in error had refused to pay any

part of it, in fact there was no controversy about plaintiff in error being entitled to a credit of \$1300.00 (\$1299.97), and the \$10000 less this credit or \$8700 was the face of the policy sought to be recovered; and this \$8700 is the amount on which the 12% damages was computed (R., p. 28). And also the 6% from July 3, 1916, the date on which the proper demand and refusal to pay was made (see Agreement, R., p. 50, also Finding of Court at top of page 28, R. which is not excepted to by appellant). The fact that defendant in error recovered only \$8700 of the face of the policy is also immaterial on the question of attorney's fees. There is no contention by plaintiff in error that the amount of attorney's fees is excessive. It is also immaterial on the question of penalties and attorney's fees, that plaintiff in error may have acted in good faith in refusing to pay (see *Natl. Life Ins. Co. v. Parsons*, 170 S. W., p. 1038). For further discussion of the right of defendant in error to recover penalties and attorney's fees on policy 152775 under the Statutes of Texas see our motion to dismiss this writ of error or affirm the judgment of the state court and argument thereon. In case said motion is overruled then we respectfully ask that the judgment of the state court be in all things affirmed.

C. A. BOYNTON,  
of Waco, Texas,  
*Attorney for Defendant in Error.*

W. E. SPELL and  
J. A. STANFORD,  
of Waco, Texas,  
*Of Counsel.*

IN THE

# Supreme Court of the United States

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October Term, 1923

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No. 325

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AETNA LIFE INSURANCE COMPANY AND AETNA  
CASUALTY AND SURETY COMPANY,

*Plaintiffs in Error.*

vs.

MRS. PEARL STONE DUNKEN, ADMINISTRATRIX  
OF THE ESTATE OF W. J. DUNKEN, DECEASED,

*Defendant in Error.*

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SUPPLEMENTAL ARGUMENT BY DEFENDANT IN ER-  
ROR IN REPLY TO BRIEF AND ARGUMENT BY  
PLAINTIFFS IN ERROR IN OPPOSITION TO  
MOTION TO DISMISS OR AFFIRM.

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*To the Honorable Supreme Court of the United States:*

From an examination of the brief and argument of  
plaintiff in error it will be observed that all his contentions

to show jurisdiction are based upon two propositions, to-wit: 1. That the new policy No. 152775, the one recovered upon, was a Tennessee contract; 2. That if it was a Texas contract, to construe our Texas statutes as allowing the recovery of penalties and attorney's fees would render said statute, so construed, unconstitutional, because defendant in error demanded, and sued for, substantially more than she recovered. Taking up these questions in the inverse order:

### I.

It is immaterial under our Statute Art. 4746 providing for the recovery of penalties and attorney's fees, what Mrs. Dunken sued for; but as a matter of fact, did she sue for substantially more than she recovered? Beginning about the middle of the eighth paragraph of her first amended petition on which the case was tried, (R. 4) we copy her pleading as follows: "That at the time of the death of said W. J. Dunken, said last named policy, No. 152775 for \$10,000.00, was in full force and effect. But in case this Honorable Court should find that said last named policy No. 152775 for \$10,000.00 had not become effective, then plaintiff says that said term policy No. 98322 for \$10,000.00, was still in full force and effect, for it was distinctly understood and agreed by defendant with the assured, that said term policy should remain in full force and effect until said commercial 20 pay life policy should become effective; that each of said policies is for the same amount, \$10,000.00 and each is payable to the administrator or executor of the assured, and that by reason of all of the



facts as above set out, the defendant became bound and obligated to pay to the administratrix of the estate of W. J. Dunken, deceased, the said sum of \$10,000.00 *less any indebtedness, if any, of said W. J. Dunken to defendant.*"

Then in ninth paragraph (R. p. 5) : "Plaintiff would further represent and show to the Court that, notwithstanding the defendant became bound and obligated to pay to the administratrix of the estate of W. J. Dunken, deceased, said sum of \$10,000.00, as above set out," etc. The claim as above set out was for \$10,000.00, less indebtedness of Dunken to the company, regardless of which policy might be recovered upon.

And in tenth paragraph (R. 5) the following: "Premises, considered, plaintiff prays that on final hearing hereof that she be permitted to recover of the defendant on policy No. 152775 the sum of \$10,000.00 less any indebtedness, if any, on said policy, and in the event the Court should find that policy No. 152775 has not become effective and a binding obligation against defendant, that then, and in that event, she be permitted to recover \$10,000.00 on policy No. 98322 *less any indebtedness, if any, on this policy,*" etc.

Then in her second supplemental petition (R. 12 to 19) the only reference to the amount sought to be recovered was in the prayers (R. 19) as follows: "Wherefore, plaintiff prays that she be permitted to recover as prayed for in her first amended petition." As stated above, under the Texas statute authorizing the recovery of penalties and attorney's fees, it is immaterial whether a plaintiff recovers

the amount sued for or not; but as plaintiff in error has been raising and discussing this same point—that Mrs. Dunken failed to recover the amount sued for in all the appellate courts, we have copied her pleadings on this question. This Texas statute, Art. 4746 is copied in full on page 16 of Brief and Argument of plaintiff in error.

## II.

Said statute, Art. 4746, does require that a demand be made upon the insurance company for payment, and gives the insurance company 30 days to comply with such demand before penalties will attach, and plaintiff in error complains throughout his brief and argument that the demand for payment made by defendant in error was exorbitant and was not therefore a compliance with Art. 4746, for which reason she was not entitled to recover penalties, even if policy 152775 was a Texas contract. Was the proper demand made? These matters were all controlled by agreements incorporated in the record as follows: "It is further agreed that proof of death of the deceased was waived by the defendant insurance company, and that the *necessary statutory demand*, in order to entitle the plaintiff to the 12 per cent damages and to reasonable attorney's fees, was made by the plaintiff, provided, under other facts in this case, the plaintiff is entitled to recover such penalties." (See middle of p. 50 of Record). Also the following agreement: "It is further admitted that Mr. Wiley J. Dunken died on or about June 1st, 1916, and proof of death was waived, and statutory requirements, in order to recover 12 per cent damages and reasonable attorney's fees were com-

plied with, provided the statute is applicable in this case." (Record near top p. 86). That counsel for plaintiff in error fully understood the scope of the above agreements, see Sec. C of his objections to the findings of the trial court, in his Bill of Exception No. 4, Record p. 31, as follows:

"(C) To the finding of the Court in substance that there was an agreement of counsel that plaintiff in all things complied with the statute that entitled her to recover 12 per cent damages and reasonable attorney's fees, as a result of defendant's failure to pay said amounts when due, said agreement being in fact qualified, as shown by the evidence in the record, by the proviso in substance, that such statute is applicable to this case, there being no agreement that such statute is applicable."

In view of the record above quoted, should counsel for plaintiff in error be heard to say now, that, even if the policy upon which recovery was had, was a Texas contract, that Mrs. Dunken was not entitled to recover penalties and attorney's fees on the ground that she failed to comply with the Texas statute, and to base supposed federal questions on the allowance of such recovery? Such supposed federal questions are worse than frivolous.

### III.

By reference to the first assignment of error by plaintiff in error, beginning near bottom of page 10 of brief, and by reference to their second and third assignments of error on page 14 of the brief, and also by reference to their argument on pages 16 and 17 of brief, it is clear that all their supposed federal questions are based on their assumption that the policy No. 152775, upon which recovery was had, was a Tennessee contract and not a Texas contract. And

the decision of this question, we believe, should determine the disposition of this motion.

The new policy does recite: "This policy and the application herefor constitute the entire contract between the parties hereto," etc. (See Sec. 8, R. 69). The fact that the application for the term policy constituted a part of the application for the new policy would not make the Term policy a part of the new one. The application for conversion in part is as follows: "I, W. J. Dunken, of Waco, County of McLennan, State of Texas, hereby apply to the Aetna Life Insurance Company for changed insurance on my life in accordance with the conditions of Term policy No. 98322 issued by said company." By reference to Sec. 10 of the Term policy (R. p. 41) there are only two of these conditions or options. (1) To exchange it without medical re-examination for any level premium life or endowment policy then being issued by the company at the attained insuring age of the insured" (2) "or for such policy bearing the same date as this policy on payment of the difference in the premiums already paid on this policy and the premiums on the new policy together with 6 per cent interest on this difference," etc. There were several "modes" of settlement in case the Term policy became a claim, but these were the only two options for changed insurance from the seven year convertible Term policy, (temporary insurance) to a level premium life or endowment policy. It will be observed further the company did not regard them as the same contract, in that, great care was taken that both should not be outstanding at the same time, in that, in the application for conversion the insured was required to certify that the

Term policy had not been assigned. (R. 76). Also Mr. Alexander wired Dunken for the Term policy to send in with the application for conversion (Record 64). At the same time the new policy or contract was issued, the old one was marked "Surrendered; new number 152755, \$10,000.00," and same was made by an executive officer at the home office at the time the new policy was issued. (R., p. 65, see also R. p. 126). It will be observed further that the application for conversion of the Term policy, after reciting "and agree that the statements and answers in the application for said Term policy shall be the basis of the new contract or policy herein applied for and form a part of the same," continues, "except that the *kind of policy*, amount of same, and the premium thereon shall be as specified below." Excluding from the application the matters excepted, and we have left only the statement of the assured, as to his name, occupation, date and place of birth, age, residence, if he had consulted a physician in last five years, other insurance carried, condition of his health, family record, etc. These answers and statements were attached and became a part of the Term policy, and were also attached to, and became a part of the new contract, but does this fact make the old policy the same as the new one, or make it any part of the new contract, any more than if an entirely new application had been taken and attached to the new policy, containing the same answers and statements?

One obligation of the Term policy was, if the assured died before it was converted into another kind of insurance, and before the expiration of seven years, the limit of its existence, to pay to his estate \$10,000.00, provided of

course, the annual premiums of \$105.40 were kept paid up. Another obligation of said Term policy was, at any time within five years, and while the policy was in good standing, at the request of the assured, without medical re-examination, to convert it into a 20-payment commercial policy, giving said new policy same date as the old one, and to give the assured credit for the annual premiums of \$105.40 paid on the Term policy on the corresponding annual premium of \$277.77 on the new policy. Dunken paid the premiums on the Term policy up to January 28, 1916. On February 16, 1916, Mr. Alexander, state manager for Tennessee for the Aetna Life Insurance Company, on his own initiative, undertook to have the Term policy converted. (See letter to Dunken R. 60-61) and Dunken's reply, (R. 61). A note was taken for \$106.45 due March 29, 1916, to extend the Term policy to said date. This note was not intended to be paid but was given to keep the Term policy in force until it was converted. (See letters of Alexander to Dunken, R. p. 60-61-62-63-64 and 65).

On February 28th, 1916, at a time when the old policy had more than a month to run, at Hartford, Conn., the home office of the company, J. L. English, vice-president of the company, with a copy of the extension note before him (See admission R. 84, also 65 and 126) marked the Term policy "Surrendered; new number 152775; \$10,000.00" (R. 65) and at the same time issued the new policy and mailed it to Alexander for delivery to Dunken, (R. p. 66) and Alexander mailed said new policy to Dunken, (R. p. 66). At the time the Term policy was marked "surrendered" and the new one issued and delivered, and Dunken given credit



for the premiums paid on the Term policy, in the purchase of the new one, as shown by J. L. English's letter and statement, is it not true that the Term policy passed out of existence, and was fully satisfied by reason of its every obligation having been complied with? It is true, as stated in our former argument, the new policy is complete in itself, and does not even refer to the Term policy. It is also true that the new policy was issued to W. J. Dunken, a citizen and resident of Waco, Texas, and made payable to him or his estate, and that the company knew he was such citizen of Texas (R. p. 76), and at the same time the company was doing a life insurance business in Texas, under its laws by virtue of a license or permit from this State. Again referring to Sec. 10 of the Term policy, (R. 41) it will be observed, this section, after providing that the Term policy may be exchanged for any level premium life or endowment policy then being issued by the company at the attained insuring age, or it may be exchanged for such a policy now issued by said company, which shall bear the same date as this policy and be issued at the same age, etc., continues with only the following provisos or limitations: "Provided in either case that the premiums required by such new policy shall be paid at the times stipulated for payment of premiums under this policy, that the issue of the new policy will not violate any law, that application for such new policy be made and this policy returned to the home office of said company before default in the payment of premium and within five years from its date, that the amount of insurance shall not be increased or the premium rate per \$1000 of insurance be less than that required by this policy, and that if such new policy is on the installment plan, the pres-

ent value at the beginning of the installment period of all the installment payments required of the company shall be considered the amount of insurance under such policy." The above are the only limitations or requirements of the new policy. It will be noted there is no limitation or requirement that the new policy shall be subject to the laws of the same state that are applicable to the Term policy, on the contrary it would seem the company contemplated the new policy would likely be subject to the law of some other state, in that, the provision is made, "that the issuance of the new policy will not violate any law." But suppose this section of the Term policy had contained the further provision, that the new policy shall be subjected to the laws of the same state as control the Term policy, would it not still be a Texas contract under the admitted facts of this case? Art. 4950 of Texas statutes, enacted in 1909, reads as follows in full: "Any contract of insurance *payable* to any citizen or inhabitant of this state by any insurance company or corporation doing business within this state shall be held to be a contract made and entered into under and by virtue of the laws of this state relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed, and the premiums and policy (in case it becomes a demand) should be payable without this state, or at the home office of the company or corporation issuing the same." See also Art. 4972 of our statutes copied in full on page 8 of our original argument.

Counsel for plaintiff in error does not question the validity or application of these articles of our statute. Reduced to its last analysis, the position of counsel for plaintiff in error seems to be, that because the insurance company, un-

der an agreement in the old policy to do so, permitted the assured to use the amount of premiums paid on the old policy in the purchase of the new policy, that thereby the new policy became the same contract as the old. As we see it, there is neither reason nor logic in this contention and it is frivolous in the last degree.

#### IV.

We would not say any more, except for some misleading statements of counsel for plaintiff in error, in reference to waivers relied upon, and as to evidence in support of same. The waiver plead as to the new policy No. 152775, in effect, was, that the policy itself provides, "that the delivery of said policy shall be a receipt for the payment of the first premium." That by the acts of the company, at its home office, in cancelling the Term policy and marking it "surrendered" on February 28th, 1916, at a time when it had more than a month to run, and by, at the same time issuing the new policy, and rendering a statement charging Dunken with the cost of conversion, and sending said new policy to its state manager at Nashville, Tenn., for delivery to Dunken, and by its unconditional delivery of said policy through its state manager to Dunken, on or about March 6th, 1916, etc., said company waived the *prepayment* of the amount due on the new policy, etc. (See R. 18).

The company had the right to withhold the delivery of the new policy until the amount due on same was prepaid, but they also had the right to waive such prepayment and proceed to deliver the new policy as a completed contract, which they did; and in so doing they were carrying out

State Manager Alexander's suggestion contained in his letter of February 16th, 1916, (R. 60) to Dunken in which he said: "Sign the blank extension note and return to me, which will give you two months from January 28 before you have to pay anything on the new premium, and then I can allow you to make only small partial payments along as usual." Mr. Alexander took the position, and rightfully so, that the signing of this extension note kept the old policy in force until March, 29th, 1916; but on February 28th the old policy was marked "Surrendered" at the home office and the new one issued and sent to him for delivery. Dunken was entitled, in any event, to have his protection continued uninterrupted to March 29th, the old policy could not protect him after February 28th, for on that date it was cancelled at the home office. If he was entitled to protection, he was entitled to the possession of a policy to evidence such protection, and as the new policy was the only one that could protect him after February 28th, and there was nothing due on it until March 29th, why should it not be delivered? The question of a delivery of a policy without prepayment of amounts due on it, was not involved in the Ellis case cited by counsel, and so the quotation by counsel from the Ellis case has no application to this case. The opinion in this case does not overrule any other opinion of our Supreme Court, but expressly follows such opinions, and does not give a new construction to any Texas statute. (See opinions R. 128-133).

## V.

Counsel for plaintiff in error, page 20, of his brief says: "The record before this Court conclusively shows that the insurance company did nothing subsequent to the default except to declare the entire insurance lapsed, and try to secure the surrender of the policy on which the judgment in this case was rendered." Does the record bear out this statement? It was admitted of record that the new policy No. 152775 was mailed from Nashville, Tennessee, by H. B. Alexander, state manager, to W. J. Dunken at Waco, Texas, on March 4th, 1916, and that it was received by him in two or three days. (R. p. 94 also top p. 84) and that after his death said policy was found in his safe where he kept his other valuable papers and that it had been there from the time he received it. (R. top p. 84). It was further admitted that Dunken had no other communication from the insurance company or any of its agents after the letter of March 4, 1916. (R. bottom p. 94, also middle p. 67). This policy 152775 was unconditionally delivered to the assured and received by him about March 6, 1916. (R. p. 66). He put it in his safe where he kept his other valuable papers where it remained to the day of his death, June 1, 1916. No officer, agent or representative of the Aetna Life Insurance Company, nor any one else, ever requested him to return it or intimated to him or his family that it was not in force until after his death.

The record discloses that plaintiff in error had a fair trial. The findings of the jury on the question of waiver, a question of fact, was expressly approved by the trial court, also by the Court of Civil Appeals of Texas, also by our

Supreme Court; and there are no grounds for the suggestion of counsel for plaintiff in error, that property rights have been confiscated, without due process of law, etc. The record in this case, together with the opinion of the Court of Civil Appeals (R. 128 to 133) is a complete answer to such contention. The alleged federal questions being made only by pleading, and wholly frivolous, we pray that our motion to dismiss or affirm be granted.

C. A. BOYNTON,

*Attorney for Defendant in Error.*

Waco, Texas.

W. E. SPELL,

J. A. STANFORD,

*Of Counsel.*

Waco, Texas.



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**No. 325.**

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**IN THE**  
**Supreme Court of the United States**

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**AETNA LIFE INSURANCE COMPANY ET AL.,  
PLAINTIFF IN ERROR,**

**VS.**

**MRS. PEARL STONE DUNKEN, ADMINIS-  
TRATRIX, DEFENDANT IN ERROR,**

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**IN ERROR FROM COURT OF CIVIL APPEALS OF TEXAS.**

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**STATEMENT OF THE NATURE AND  
RESULT OF THE SUIT.**

We do not accept as correct, the statement of the nature and result of the suit as made by plaintiff in error, but for correct statement refer to our brief filed herein. And in addition to what is said in our brief, as to the nature and result of the suit, we desire to state that the issue made by the pleadings of both parties, as to the new policy No. 152775, the one upon which recovery was had, was not whether or not the assured was in default and the insurer waived such default, but the issue was whether or not the insurer waived the *prepayment* of the amount due on the new policy and elected to de-

liver it as a completed contract with the intention of its becoming an effective and binding obligation on its receipt by the assured. There was no controversy about its actual manual delivery to W. J. Dunken on or about March 6, 1916, without any apparent limitations to such delivery, and that he retained possession of it, without anybody requesting its return or intimating to him that it was not a valid and binding obligation, to the day of his death, June 1, 1916. The issue as to this policy was the *intention* of the insurer in making such delivery. Defendant in error contending the insurer waived the *prepayment* of the amount due on the new policy and delivered it with the intention of its becoming a valid and binding obligation on its receipt by the assured (R. 18). Plaintiff in error contended in its pleading and argument that it was not delivered with the intention of its becoming effective, but for inspection, etc. (R. 10, near top page). We have tried to make clear the issues made by the pleadings as to the new policy, the one upon which recovery was had, in order that this Honorable Court may properly appraise the extended argument of plaintiff in error to the effect, "there was an admitted default on the part of the assured, and that the company did nothing after the letter of March 4, 1916, to waive such default," etc. Such argument might have some application to that old policy, but it is not in issue on this appeal.

### I.

This Honorable Court should sustain the motion of defendant in error to dismiss or affirm the judgment of

the state court, because there is no substantial Federal question involved.

1. On pages three and four of his brief, counsel for plaintiff in error gives an outline of the questions upon which he relies to show jurisdiction as follows:

"(a) The alleged policy or contract on which judgment was rendered never became a completed or binding contract," etc. \* \* \* "And, as the judgment establishes a change in the rule of law, in violation of the Insurance Company's constitutional rights, it is also within the scope of the Act of Congress, approved February 17, 1922 (42 Stat. 366, amending Sec. 237 of the Judicial Code, recently construed in *Tidal Oil Company v. Fannagan*, January 7, 1924)."

"(b) The alleged policy (if a contract at all) was not a Texas contract. It was a Tennessee contract (or if not, it was a Connecticut contract) etc."

"(c) Even if the alleged policy had been a binding Texas contract, as plaintiff demanded and sued for substantially more (\$1,300.00) than she recovered, the suit was rightfully defended; and the Texas statute *as construed and applied in this case*, violates the due process and equal protection clauses of the Fourteenth Amendment." But counsel admits further on in his brief that the Act of Congress approved February 17, 1922 (42 Stat. 366, amending Sec. 237 of the Judicial Code), as held in the *Tidal Oil Company* case above referred to, does not extend or enlarge the jurisdiction of this court, and if the facts of this case were such as to come within the provisions of said Amendment, the same

would constitute no grounds of jurisdiction. The substance of the statement under subdivision "(a)" above is, that there is no evidence to support the judgment of the state court. It is not an uncommon occurrence for an attorney who has lost a case to make this statement, and if this were a ground of jurisdiction, then all cases could be taken from state courts to this court. We do not understand that plaintiff in error contends that the matters in subdivision "(a)" constitute any grounds of jurisdiction, in fact the contrary appear in subsequent parts of his brief. Under his first assignment of error, page 15 of brief, counsel for plaintiff in error raises the same two questions on the recovery of damages and attorneys' fees, to-wit: "(1) Plaintiff not having recovered the full amount sued for, the statute is not applicable in any event; and (2) because the evidence conclusively shows that said policy, even if it is a completed contract, is not a Texas contract," etc. There is no contention that the second or third assignments present any grounds for jurisdiction.

Then on page 18 of his brief counsel for plaintiff in error says:

"Reserving for later consideration the Act of 1922, we will first consider this case independent of such Act, then limiting the immediate discussion to our attack on the judgment for statutory penalty and attorney's fee, on the Federal grounds stated in our first assignment of error heretofore quoted."

And again on same page: "The judgment for statutory penalty and attorney's fees is attacked on three



separate grounds: (1) Under the full faith and credit clause; (2) under the contract clause; and (3) under the due process and equal protection clause of the Constitution of the United States."

As stated in our argument on the motion to dismiss or affirm (pages 1 to 3 of said Argument), it is apparent that all of the contentions of plaintiff in error to show jurisdiction are based on two propositions, to-wit: 1. That the new policy No. 152775, the one recovered upon, was a Tennessee contract; 2. That if it was a Texas contract, to construe our Texas statutes as allowing the recovery of penalties and attorney's fees, would render said statute, so construed, unconstitutional, because defendant in error demanded and sued for substantially more than she recovered. There is certainly no substantial Federal question in this last contention, for the following reasons, to-wit: (1) The question of a *proper demand* is not raised by any assignment of plaintiff in error. (2) There are two solemn agreements incorporated in the record controlling this question, one admitting "that the *necessary statutory demand*, in order to entitle the plaintiff to the 12% damages and reasonable attorney's fees was made by the plaintiff, provided under other facts in the case the plaintiff is entitled to such penalties (R. 50). And the other a little broader, as follows: "It is further admitted that Mr. Wiley J. Dunken died on or about June 1st, 1916, and proof of death was waived, and "*statutory requirements in order to recover 12 per cent damages and reasonable attorney's fees were complied with*, provided the statute is applica-

ble in this case (R. 86). The only issue on the trial being whether this policy was a Texas contract governed by the Texas statutes or a Tennessee contract governed by the Tennessee statutes." (3) Defendant in error did not sue for more than she recovered, as fully appears from the concluding part of the eighth paragraph of her amended petition (R. 4), also ninth paragraph and prayer (R. 5), all fully set out in our argument on motion to dismiss or affirm on pages 2 and 3. (4) The first amended petition of plaintiff, in which she sought to recover the face of the policy less any indebtedness against said policy was filed Dec. 23, 1916 (R. 1). The case has been tried three times and three times taken through all the higher courts of Texas, and plaintiff in error has never admitted liability or offered to pay anything, yet counsel for plaintiff in error wants this court to hold that because our Texas courts permitted defendant in error to recover the 12 per cent damages on the amount she did recover and reasonable attorney's fees under Art. 4647 of our Statutes controlling said matter, that a serious Federal question is raised involving the validity of said statute as applied. The question here involved, in a nut shell, is simply this: defendant in error sued for the face of the policy, \$10,000.00, less any indebtedness against said policy.

It developed on the trial that the indebtedness against the new policy was \$1300.00, and the face of the policy recovered, and on which the 12% damages was assessed was \$8,700.00. Would the effect of the pleading or the net result been any different if Mrs.

Dunken had ascertained the exact amount of this indebtedness, subtracted it, and sued for the balance, \$8,700.00? This is a fair sample of the frivolousness of the Federal questions raised.

2. And all of the other alleged Federal questions, based on the contention of plaintiff in error that policy No. 152775 was a Tennessee contract, are equally as frivolous as the one above discussed, when rightly understood.

Was policy No. 152775, the one upon which recovery was had, a Tennessee contract, or was it a Texas contract? In discussing this question some of the provisions of our Texas statutes become important. It was admitted that plaintiff in error, at the time it issued to W. J. Dunken the new policy No. 152775, had procured a license to do, and was doing a life insurance business in Texas (R. 89). Art. 4972, Texas Statutes, reads as follows: "The provisions of this title are conditions upon which foreign insurance corporations shall be permitted to do business within this state, and any such foreign corporation engaged in issuing insurance contracts or policies within this state shall be held to have assented thereto as a condition precedent to its right to engage in such business within this state." The above Art. was enacted in 1903 and is a part of Title 71 of our Insurance Statutes. Art. 4950, a part of the same title, passed in 1903, reads as follows: "Any contract of insurance *payable* to any citizen or inhabitant of this state by any insurance company or corporation doing business within this state shall be held to be a contract

made and entered into under and by virtue of the laws of this state relating to insurance and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed, and the premiums and policy (in case it becomes a demand) should be payable without this state, or at the home office of the company or corporation issuing the same." Art. 4744 of our Statutes, enacted in 1903, and a part of Title 71, provides: "Suits on policies may be instituted and prosecuted against any life insurance company in the county where the home office of such company is located, or in the county where loss has occurred or where the policy holder or beneficiary instituting such suit resides." Counsel for plaintiff in error (page 26 of Brief) says: "The undisputed fact shown by the record, that no Texas representative of the Insurance Company had anything to do with the transactions here involved, merely adds superfluous emphasis to our proposition." And again on page 28, he says: "If the second policy ever became a contract, this occurred when the policy was mailed by the company's agent at Nashville, Tennessee, to the insured." But under Art. 4950, above copied, which the insurance company assented to by taking out a license to do business in Texas, and which became a part of every policy it wrote, payable to a citizen of Texas, said policy became, a Texas contract subject to the laws of Texas, by virtue of the fact, it was written payable to Dunken, a citizen and inhabitant of Texas, and it is wholly immaterial where it became a contract or whether any Texas agent had anything to do with it or not.

Again (page 29 of his Brief), after quoting a portion of the opinion of the Court of Civil Appeals, counsel says: "This opinion is obviously in error in stating that the second policy was payable in Texas. Both policies were by their express terms payable in Hartford, Connecticut (R. 39, 67). "But under the provisions of Arts. 4950, 4744 and 4970 of our Texas Statutes copied above, which were assented to, and became a part of said policy by virtues of said company taking out a license to do business in Texas, said policy being issued to a citizen of Texas, became a Texas contract, governed by the laws of Texas," and "was payable in this state," as stated in said opinion, and the fact that, "both policies were by their express terms payable in Hartford, Conn.," is of no importance. The constitutionality of the above articles of our statutes, and others of the same import, is not questioned by counsel for plaintiff in error, and indeed could not be successfully questioned. The application for conversion disclosed that W. J. Dunken lived at Waco, Texas, the new policy, the one recovered upon, was issued upon this application payable to him, a citizen of Texas (see Arts. 4950, 4972 and 4944, copied above, also Argument and Citation of Authorities on pages 8, 9, 10, 11 and 12 of our Motion to Dismiss or Affirm the Judgment of the State Court). The cases cited by plaintiff in error on pages 30 and 31 of brief have no application to the question here involved, in that in the cases cited the question involved was not controlled by any local statute, as is fully explained in the introductory paragraph of the extended note in 63 L. R. A. 833-837.

If there is any Federal question involved in this case it arises out of the contention of plaintiff in error that the new policy was a Tennessee contract because the old one was such. Is there anything substantial in this contention?

The new policy duly executed by M. G. Buckley, president of the Aetna Life Insurance Company of Hartford, Connecticut, is shown as Exhibit 27 (R. 67-68). From pages 68 to 76 of Record follows the conditions endorsed on said policy, and on pages 76 to 83 appears the application for the conversion of the old policy into the new one, and the application for the old policy, both of which were attached to the new policy. In our motion to dismiss or affirm, we said: "The new policy by its own terms makes it a separate, distinct, independent contract, complete in itself"; and we still say so, regardless of the criticism of counsel for plaintiff in error of said statement, and we base this statement on Section 8 of the new policy, which reads as follows: "This policy and the application herefor constitute the entire contract between the parties hereto," etc. (R. 69). In view of the above clause contained in the new policy itself, is there a shadow for the contention of plaintiff in error that the old policy is any part of the new one?

We also said in our motion: "The new policy nowhere even refers to the old one," and we still say so. The application for conversion mentions the old policy, but the new policy itself nowhere mentions the old one; but it is separate, distinct, independent and complete in itself. Counsel for plaintiff in error lays much stress

upon the fact that the statements contained in the application for the term policy shall be the basis of the new contract. The evident purpose was that the applicable statements only should become a part of the new contract. The application for conversion and the application for the old or term policy were attached to and constituted the application for the new policy (R. 76-81). The application for the term policy made Dec. 17, 1910, contains the following questions and answers: "Where do you reside? 3104 Dudley Ave., Davidson County, Tenn. What is your business address? 8 Noel Block, Nashville, Davidson Co., Tenn." (R. 78).

The application for conversion made Feby. 19, 1916, in part reads as follows: "I, Wiley J. Dunken, of *Waco*, County of McLennan, State of *Texas*, hereby apply to the Aetna Life Insurance Company for changed insurance on my life," etc. (R. 76). The first clause of the new policy issued Feby. 28, 1916, on above application for conversion, reads as follows: "The Aetna Life Insurance Company of Hartford, Connecticut, hereby agrees to pay for the surrender of this policy at its home office the sum of ten thousand dollars (herein called the sum insured) upon receipt of due proof of the death of Wiley J. Dunken of *Waco*, County of *McLennan*, State of *Texas* (herein called the insured)" (R. 67). Again the application for term policy (which was also an application for a twenty payment commercial policy, which is in no way involved in this suit, except as a part of the history of the transaction), contains the following questions and answers: "What kind of



a policy is desired? \$10,000.00 twenty payment life commercial policy. \$10,000.00 7 year convertible term. Date policies Jany. 28, 1911. Amount of insurance? twenty thousand, \$20,000.00. Premium, \$384.20 annually" (R. 78). (This premium as it appears \$38.20 is a clerical error, as will be seen by reference to R. 47, where the same instrument appears, the \$384.20 being the total of \$277.70 premium on the first commercial policy, not in issue here, and \$106.50 premium on the term policy.)

In the application for conversion we have the following questions and answers: "What kind of policy is desired? 20 payment life commercial, to be dated Jany. 28, 1911. What amount of insurance is desired? \$10,000.00. Premium, \$277.70, annually" (R. 76). As stated above, it was only the questions and answers in the original application that were applicable to the situation as it then existed, and to the matter in hand then to be accomplished, to-wit, the conversion of the term policy into a commercial twenty payment life policy, that were intended, together with the application for conversion, to constitute the application for the new policy. In fact the application for conversion excepts from said original, the kind of policy, the amount of the policy and the premiums on same (R. 76). Other matters, such as his name, the employment in which he had been engaged, the place and date of birth, age at next birthday, if he had ever had certain diseases mentioned, if he had ever been refused insurance, his family history, etc., were all matters of past history, and presumably answered truth-

fully in said original application, and if so, if a complete new application had been taken asking the same questions, would not the answers have been the same? Would there have been any difference in attaching a copy of the original application containing questions and answers as to these matters of past history, and attaching a new application containing the same questions and answers?

Suppose a man makes application for two policies of insurance, and to each policy is attached and made a part thereof, an application in which the questions and answers are the same, would that be any evidence that the policies were one and the same contract? Or that one was any part of the other? The original application was an application for two policies, one a \$10,000.00 twenty payment life commercial policy and the other a \$10,000.00 seven year convertible term policy, both dated Jany. 28, 1911 (R. 47). To each was attached and made a part thereof, a copy of this same application. Nobody ever contended that these policies were the same, or that one was any part of the other. But the Insurance Company converted the term policy into another twenty payment commercial policy, No. 152775, of same date and same amount as his first twenty payment commercial policy. See letters, Alexander to Dunken, dated Feby. 16, 1916 (R. 60-61), also, Feby. 24, 1916 (R. 65). Counsel for plaintiff in error also contends the new policy, No. 152775, was only "a supplemental," or "subsidiary" instrument, supplemental the original policy, and that the same results might have been obtained by attaching "riders" to the term policy, and hence, the new

policy the same contract as the old, and a Tennessee contract. If the company had attempted to pursue the "rider" route, they would have had to attach one, changing the number from 98322 to 152775, another changing the annual premium from \$105.40 to \$277.70, another changing the policy from a temporary policy that could not continue in force in any event more than seven years, to a life policy, another changing it from a level premium policy to a twenty payment commercial or endowment policy, another adding to it a loan value, another adding to it a cash surrender value, another adding to it a paid up or extended insurance provision, another cutting out Section 7 authorizing it to be contested within one year for reasons other than failure to pay premium, another cutting out Section 9, the suicide clause, another adding the incontestable clause, another adding the non-forfeiting clause—Clause 14, another adding provisions for disability, and we do not know how many other changes would have been required, but evidently there would have been nothing left of the term policy except its date, as will appear by comparing said policies (R. 39 to 45; also 67 to 76). It is absurd to talk about the new policy being a "supplement" or "subsidiary" contract or policy to the term policy. The new policy was doubtless the real contract the parties had in view, and Dunken was induced to take the term policy only because it afforded him temporary protection and granted him the right at any time within the five years, without medical re-examination to use the premium paid on the term policy in the purchase of a twenty payment commercial policy.

He had two options in making this exchange, (1) to exchange for any level premium life or endowment policy at the attained insuring age of the insured on payment of the premium required for such policy at the advanced age of the insured; (2) to exchange it for such a policy bearing the same date as the term policy on payment of the difference between the premiums already paid on the term policy and those that would have been required under the new policy, with six per cent interest (R. 41). The only limitations were that the premiums on the new policy should be payable at the same time as they were payable on the term policy, Jan. 28, that the issue of the new policy will not violate any law, that an application for such new policy be made and the term policy returned to the home office before a default in the payment of premiums on it, and within five years from its date, that the amount of insurance shall not be increased or the premium rate per \$1,000 be less than required by the term policy (R. 41, Sec. 10). Is there anything in the above section limiting the *kind* of policy to be issued, or the amount of it, or the premium rate, or the beneficiary, or under what state's laws it shall be governed? As a matter of fact, if said section had contained a provision that the new policy shall be a Tennessee contract, and, if said provision had been inserted in the new policy, when said policy was issued to Dunken, a citizen of Texas and payable to him, a citizen of Texas, under the provisions of Arts. 4950 and 4972 of Texas Statutes, copied above, and which has been assented to by the Insurance Company by taking

out a license and doing an insurance business under and by virtue of the insurance laws of Texas, would not all such limitations in said section or in said new policy, been nugatory, and the said policy construed to be a Texas contract? Is there anything in Sec. 10, of the term policy, that would indicate that the new policy, into which it might be converted, was intended to be, "only another stage of the same contract"? Or "supplementary to the term policy"? Or a "subsidiary contract to the term policy"? The heading of this section is: "May be *exchanged* for insurance of *another kind*." Said section twice recites, the term policy may be "*exchanged*," and six times refers to the policy for which it is to be exchanged as the "new policy." If one contract is *exchanged* for another then the latter could not be "supplementary" or "subsidiary" to the former. If a policy of insurance is exchanged for a policy of insurance of *another kind*, then the latter could not be "supplementary" or "subsidiary" to the former. If the term policy was exchanged for a *new policy*, then the new one could not be "supplementary" or "subsidiary" to the old one (see Sec. 10, R. 41). The application for conversion, which was prepared by the Insurance Company, was an application by Dunken for "*changed insurance*" on his life (R. 62). Vice-president J. L. English's letter shows policy 98322 was "*exchanged*" for 152775, and at same time No. 98322 surrendered (R. 66).

In the purchase of the new policy dated back to the same date as the old one, Dunken was given the benefit of the premium (\$527.00) he had paid on the old policy

in accordance with his previous contract made in Tenn. with the company, but is this any reason for contending that the new policy was a Tennessee contract?

We submit that it is clear that the new policy is a separate, distinct, independent contract, complete in itself, no part of the old one and the old one no part of the new one. It is equally clear, that the new policy was not supplementary or subsidiary to the old, and so it necessarily follows that the new contract was not a successive stage of one insurance contract, as the written evidence (policies) evidencing the two contracts and all the other evidence abundantly shows. See also authorities and argument on our motion to dismiss the writ of error or affirm the judgment of the state court. The facts of this case viewed in the light of the applicable Texas Statutes copied above, leaves no doubt but that the new policy, No. 152775, the one recovered upon, was a Texas contract, governed by the laws of Texas, and not the laws of Tennessee nor Connecticut, and as all of the supposed Federal questions relied upon by counsel for plaintiff in error to give this court jurisdiction being based upon his contention that said new contract was a Tennessee contract or a Connecticut contract, it necessarily follows that there is no substantial Federal question involved, and our motion to dismiss should be sustained.

## II.

We come now to the part of the brief of plaintiff in error in which counsel discusses his second and third assignments of error (pages 41 and following of his

Brief), and it will be noted counsel does not contend that these assignments present any grounds for jurisdiction, but relying solely upon his first assignment, based upon his contention that the new policy was a Tennessee or Connecticut contract, for jurisdiction, contends this court has the authority to review the questions raised in his second and third assignments. We do not believe the court will ever get to this branch of the case, but if it should, is there any merit in the contentions here asserted?

1. Counsel says: "It has never been contended (and cannot be seriously contended) on the facts shown by this record that plaintiff had any case whatever, in law or equity, unless the admitted default of the assured was waived by the company"; etc. (p. 42 of Brief). As stated in the first part of this reply brief, there was no "admitted default" as to either policy. The plaintiff in the trial court plead in substance, that the company waived the *prepayment* or *pre-settlement* of the amount due on the new policy and elected to deliver it as a completed contract with the intention that it should be an effective obligation from its receipt by the assured, and that if this were not true, then the company by all it had said and done with reference to both of said policies, had waived its right to forfeit the old policy by reason of the failure to pay the \$106.40 note on its maturity March 29, 1916, for it was understood the old policy should remain in force until the conversion was completed and the new one took effect (R. 16, 17 and 18). As to the new policy, defendant in the trial court plead:



"And said policy was never in fact delivered to said Wiley J. Dunken, or to anyone in his behalf, except provisionally, in order that he might inspect the same," etc. (R. 10). So the issue made by the pleadings, as to the new policy, the one upon which recovery was had, was whether or not the company delivered the new policy with the intention of its becoming effective on its receipt by the assured, which involved the decision of the question whether the company waived the *prepayment* of the amount due on the new policy. There is no contention anywhere that the trial court did not correctly present all the issues made by the pleadings (R. 26-27).

After this case has been tried three times in the trial court, three times in the Court of Civil Appeals of Texas, and twice in the Supreme Court of Texas, on the same pleading and the same issue as to the new policy, as indicated above, why should counsel still be talking about an "admitted default" on the part of the assured, and that the company did nothing *after* said default to waive same? "There is no man so blind as he that will not see." The issue is not, and has never been, as to the new policy, especially, whether or not the company waived a default, on the part of the assured, but the issue is and has at all times been, whether the company waived the *prepayment* of the amount due on the new policy, and delivered it with the *intention* that it be a binding obligation on its receipt by the assured.

2. Again on page 43 of brief, counsel for plaintiff in error after quoting from the opinion of the Court of Civil Appeals on the last appeal, says: "On this issue

(as to whether Alexander delivered the new policy with the intention that it should become a completed contract) there is not even a hint in the record of any evidence, except the letter from Alexander to the insured, March 4, 1916," etc. How counsel could permit his zeal for his client to lead him to make the above statement, in the face of this record, is more than we can understand. Of course the Court of Civil Appeals on the last appeal did not discuss the evidence showing that state manager H. B. Alexander did deliver the new policy to the assured with the intention that it should be a binding obligation on its receipt by him. This same court had done so one time before (see 221 S. W. 693 to 695). The evidence establishing said fact is also set out in our brief filed herein on pages 9 to 49. In addition to what we have said above, and what we said in our brief above referred to, and in addition to what the Court of Civil Appeals on a former appeal (221 S. W. pp. 693 to 695) said, we desire to state further: That there *was* an actual, manual delivery of the new policy about March 6, 1916, to the assured—cannot be denied, all the evidence shows this fact. That it was delivered by state manager Alexander, to whom the company had delegated the duty of delivering all policies in his jurisdiction, can not be denied, all the evidence shows this. That, if there were any limitations on the delivery of said policy, such limitations are in Mr. Alexander's letter of March 4, 1916, transmitting the policy to the assured, for Alexander said so himself (R. 88). That there were no conditions or limitations on the delivery of said policy, is self-evi-

dent (see Letter Mar. 4, 1916, R. 66, 67). That the assured accepted said policy, placed it with his other valuable papers, and relied upon it as being a valid policy to the day of his death cannot be denied, for this is shown by all the evidence. That the company, through its state manager, on or about Mar. 4, 1916, knew said policy had been delivered, and through its assistant auditor, Howard E. Wright, on or about May 1, 1916, knew said policy had been delivered (R. 110). And on or about May 11, 1916, W. H. Newell, assistant secretary of the company, an executive officer, had actual knowledge that said policy had been delivered to the assured, yet no agent, officer or representative of the company ever made any objection to its delivery, or intimated that it was not properly delivered, or requested its return, or intimated that it was not in force, until after the assured's death on June 1st, 1916, and they were called on to, pay. Under the Texas decisions, even if this policy had not been properly or rightfully delivered, it was nevertheless delivered by the state manager, and an executive, Mr. Newell, on learning of such delivery, failed to repudiate such delivery or ask for its return and by so doing approved of its delivery (see cases cited by Court of Civil Appeals in its opinion, R. 130). Counsel for plaintiff in error makes no attack upon this part of said opinion.

3. On page 44 of his brief counsel for plaintiff in error copies two sentences from the opinion of the Court of Civil Appeals, and contends they are contradictory, for which statement there is no basis, as fully appears

from the excerpts copied; and on the next page proceeds to criticize the holding of the court, to the effect that when the old policy was marked "surrendered" at the home office and the new one issued and sent to Mr. Alexander for delivery to Dunken, the old policy was no longer of any force, and counsel says: "Clearly this was a mere clerical step in the transaction, like the letter from Alexander to Dunken, without any legal effect." Is there any tangible grounds for his criticism of this holding? Section 10 of the old policy provides: "This policy may upon any anniversary of its date be *exchanged* without medical re-examination for any level premium life or endowment policy," etc. (R. 41). The application for conversion was an application for "*changed insurance*" (R. 76).

The company required the old policy to be sent in to the home office with the application for conversion (see Telegram, R. top p. 64). On Feby. 28, 1916, at the home office, J. L. English, vice-president of the company, endorsed on policy No. 98322: "Surrendered—new number 152775—\$10,000.00," and at same time issued the new policy (see Exhibit 54 and Admission, R. 126). And at same time mailed the new policy to H. B. Alexander, saying: "Enclosed find this policy in *exchange* for No. 98322 *surrendered*" (R. 66). On March 4, 1916, H. B. Alexander, state manager, mailed the new policy to the insured, saying: "I take pleasure in handing to you herewith yourr \$10,000.00 Commercial 20 Pay L. Policy *converted* from Seven Year Term" (R. 66). If the old policy was *exchanged* for the new

one, and the old one "*surrendered*" and marked "*surrendered*" at the home office by an executive officer of the company, does it not necessarily follow that the old policy was no longer in force? Or if the old policy was *converted* into the new one, and the old one surrendered and marked "*surrendered*" at the home office by an executive officer, and the new one sent out for delivery, is not the reasonable conclusion and the only reasonable one, that the old one was no longer of any force? Evidently the company understood the old policy ceased to be of any force, else why did they require it to be surrendered? And why did they mark it surrendered at the same time they issued the new one? Counsel says: "This precise point was decided in *McGaugh v. Women's Catholic Order of Forresters*, (Wis.) 185 N. W. 174, 24 A. L. R. 746." But as a matter of fact, an examination of this case shows it does not even discuss the question involved. As a matter of fact there is no foundation in law or fact for this criticism of the opinion of the Court of Civil Appeals.

4. Counsel for plaintiff in error on page 46 of his brief, again copies a paragraph from the opinion of the Court of Civil Appeals of Texas on the first appeal of this case (204 S. W. 241), and seems to get a good deal of comfort from that part of it indicating that the new policy was sent to Dunken on certain terms and conditions. In fact the greater part of his objections, now asserted, he seeks to bolster up by certain parts of this first opinion, and in reply to all such efforts on the part of counsel, we copy from the same opinion as follows:

"The volume of business pending in this court is sufficient excuse for not writing an elaborate opinion; and we therefore content ourselves with the statement that we have reached the conclusion that the judgment appealed from should be reversed, and a brief statement of the grounds upon which such conclusion rests." As a matter of fact the judgment was reversed upon the ground that there was error in the charge of the court, and also that the trial court erred in excluding certain evidence. It was not a well considered opinion. The consideration of the grounds on which it was reversed, did not require more than a cursory examination of the evidence. But the second appeal to the same court being from a judgment based on an instructed verdict for defendant, it became necessary for the court to carefully consider the case as made by the evidence to determine if there were issues of fact for the jury, and this they did, and in reference to J. L. English's letter to Alexander in which he inclosed the new policy, said: "This letter does not indicate that the policy was not to be delivered to Mr. Dunken until the loan was made and the premiums paid, nor that it was to be delivered to Dunken only for inspection and examination" (221 S. W. 694). And in reference to H. B. Alexander's letter to Dunken in which he inclosed the new policy to Dunken, the court said: "There is nothing in this letter to indicate that it was sent merely for examination or inspection, but is clearly open to the construction that it was intended to be an absolute delivery, within the time contemplated by the parties when the extension note on policy No. 98322

was given" (221 S. W. 694). There was no question about there being an actual manual delivery of the new policy about March 6, 1916. The Insurance Company, in its pleading, undertook to explain its delivery by saying it was delivered for "inspection or examination," but there is not a breath of evidence in the record to sustain such theory. H. B. Alexander is the man who delivered it. He testified twice in the case—once in person and by deposition, he never said he delivered it for inspection or examination. The first and only time we hear of such a theory is in the company's answer filed in this case. This contention was evidently an after-thought. That there was no condition or limitation to the delivery of the new policy, as found by the Court of Civil Appeals of Texas (221 S. W. 694), is clearly shown by the entire record in this case.

5. On pages 47 to 52 counsel for plaintiff in error copies certain *words* and *excerpts*, without stating the connection in which used, as evidence of what the insurance law of Texas is or was, before the opinion in this case was rendered, in an effort to show that the opinion herein has changed the law of this state. And as specific cases, in which he claims former opinions have been overruled, he refers to the case of *Underwood v. Security, etc.*, 194 S. W. 585, and says: "And it was held that the insurance lapsed on failure to pay the note on or before its maturity." True an extension note had been taken to extend the payment of the premium and said note provided if not paid by maturity the policy would lapse. But have we any such question in the case



now before this court? He also refers to the *Equitable Life v. Ellis*, 147 S. W. 1152, 152 S. W. 625. In this case the policy had lapsed by reason of failure on the part of Ellis to pay the premium when due, but our courts held that the company by continuing to recognize the validity of the policy after the default, the Insurance Company waived said default. Have we any such question in the instant case? In the Hocker case cited by him, after stating the facts, he says it was, "Held, that such facts did not show an acceptance of the policy by decedent, and that no contract had been consummated." Of course, if decedent did not accept the policy, there was no contract consummated. Have we any such question in the case now before this Honorable Court? No, the new policy was unconditionally delivered to Dunkan about March 6, 1916, he *accepted* it and placed it in his iron safe with his other valuable papers, and nobody ever questioned its validity until after his death June 1, 1916. This opinion does not overrule any other opinion of our higher courts, but expressly follows a long line of decisions of the Supreme Court of Texas.

6. We will not undertake to reply to counsel's criticisms of the opinion of the Texas Court on page 52 of his brief, following an excerpt of said opinion; in fact if this court will read said entire paragraph of said opinion (R. 132) it will clearly appear no reply is necessary. We will say, however, we think it is unfair to this court for counsel to copy a misleading excerpt from Art. 4968 of Texas Statutes, as appears on page 53 of his brief.

This statute reads as follows: "Any person who shall solicit an application for insurance upon the life of another shall in any controversy between the assured and his beneficiary and the company issuing any policy upon such application be regarded as the agent of the company, and not the agent of the insured, but *such* agent shall not have the power to waive, change or alter any of the terms or conditions of the application or policy." It will be observed this statute applies to an agent who solicits insurance. H. B. Alexander was not a *soliciting agent*. He was manager of the Aetna Life Insurance Company for the State of Tennessee, and among other duties, he testified: "It is part of my duties as manager to deliver or supervise the delivery of all policies, and the period of time over which this has extended has been since I became manager of the company" (R. 89). That the act of the state manager in delivering this policy was the act of the company. See authorities cited in our brief on page 18, and especially the decision of our Supreme Court in the case of *Manhattan Ins. Co. v. Stubbs*, 234 S. W. 1099, and *Bankers Reserve v. Summers*, 242 S. W. 258, by the Court of Civil Appeals, and a writ of error refused by the Supreme Court, both of which have been decided since the decision in this case. However in this case the court said: "This opinion is based upon the assumption that Alexander had no authority to deliver the policy without collecting the premium, but we do not wish to be understood as so holding. The view that we take of this case renders it unnecessary for us to decide that point" (R. 132).

7. But counsel intimating that some defense might be "lurking" somewhere therein copies from his brief in the Court of Civil Appeals (R. 54) as follows: "(a) But, for the sake of argument only, treating policy No. 152775 as a completed contract, it is a receipt for the first premium only, and a receipt is only *prima facie* evidence of payment," etc. True, in a suit to recover the premium, the possession by the assured of a receipt is only *prima facie* evidence of payment and may be explained; but this rule does not apply when the question involved is not only the fact of payment, but as to the existence of rights springing out of the contract. With a view of defeating such rights, the party giving receipt cannot contradict it. The first premium on policy No. 152775, was the conversion costs plus the 1916 premium, as held by the Court of Civil Appeals of Texas on the last two appeals (*Dunken v. Aetna Life*, 221 S. W. 695, also *Aetna Life v. Dunken*, 248 S. W. 168). There was no provision for a forfeiture for failure to pay the first premium. The company issued no receipt for the first premium, but the policy provided "the delivery of the policy shall be a receipt for the payment of the first premium" (R. 69). The policy itself made its possession by Dunken his receipt for the first premium (see authorities cited, pages 46 and 47 of our Brief, also in opinion on second appeal, 221 S. W. 695).

8. Counsel for plaintiff in error on pages 57 to 61, rehashes many things making many erroneous statements not supported by the record. For instance he says :

(1) "And this letter (English to Alexander) completely rebuts any suggestion of waiver, as correctly held on the first appeal, heretofore mentioned." There are two glaring errors in this statement, to-wit: The Texas court on the first appeal made no such holding as indicated; and this letter does not indicate that the policy was not to be delivered until the loan was made and the premium paid, as was expressly held by the Court of Civil Appeals of Texas on the last two appeals (221 S. W. 691, and 248 S. W. 165). (2) Again, counsel says: "The letter expressly directs Mr. Alexander to 'report' the collection of the premium" (R. 66). There is no direction to "report the collection of the premiums."

(3) Again, counsel says: "The opinion assumes that the second policy was delivered as a completed contract, when the letter of Alexander to Dunken \* \* \* completely refutes the assumption, as expressly held on the same evidence, by the same court, on the first appeal." On the first appeal, the Texas court did not make the holding above asserted (204 S. W. 241), but if it had done so, did it not have the right afterward to correct a finding of fact? And the letter of Alexander does not refute the finding that he delivered this policy as a completed contract, said finding of fact once made by a jury, twice approved by both the Court of Civil Appeals and also the Supreme Court of Texas. (4) Again counsel says: "The opinion next assumes that the company acquiesced in such delivery. Not only is there no evidence of such acquiescence, but the only evidence is directly to the contrary" (see letter of Newell to Wright,

R. 111). In the case of *Morrison v. Insurance Company*, 69 Texas, 363, 6 S. W. 605, our Supreme Court, by Judge Stayton, said: "The ground on which insurance companies under policies like that before us are held liable for the acts of their agents done in the exercise of lawful power, but not in the manner prescribed by the policy, is that the agent represents the company and through him it has knowledge of every fact of which its agents have, and by failing to promptly repudiate such acts it is held to have ratified them or to be estopped by its silence when it ought to have spoken." The above rule was announced by our Supreme Court thirty-seven years ago, in 6 S. W. 605. It has been the settled rule of decision in Texas for at least fifty years, cited in *Insurance Co. v. Hill*, 127 S. W. 283; *Manhattan Life v. Stubbs*, 234 S. W. 1101; *Aetna Life v. Dunken*, 248 S. W. 165, and numerous other cases. Then under the above rule of law, irrespective of the question of whether the act of Alexander in delivering the policy as a completed contract was the act of the company or not, it is true that the company was chargeable with notice of what he knew about it, and if he delivered the new policy as a completed contract without prepayment of premium on about Mar. 6, 1916, then on said date through him the company knew he had so delivered it. Vice-president English, in his letter transmitting the new policy to Alexander, instructed Alexander to report on the new number 152775 not later than March 30th, and if he did so (and we should not presume he disobeyed orders), then the company on said date had actual knowledge that

he had delivered the new policy without the prepayment of the first premium. But aside from all this we do know that on May 11, 1916, Mr. Newell, an executive officer, had actual knowledge that the new policy had been delivered without the prepayment of the first premium, yet as to Dunken, the assured, they were as silent as the tomb, and nobody ever intimated that it was not in force. The first we hear of such contention is after his death on June 1, 1916, when his widow tries to collect. Our Supreme Courts have said under such conditions, "that by its failure to promptly repudiate such acts, it is held to have ratified them, or to be estopped by its silence when it ought to have spoken." And spoken, not to Howard E. Wright, its assistant auditor, nor to H. M. Alexander, its state manager, but to the assured, who was vitally interested, and who, the company knew had possession of the new policy, and knew that he was relying upon it as a valid and binding obligation.

9. But counsel in his extreme effort to cast some reflection upon the Appellate and Supreme Court of Texas, as well as to mislead this Honorable Court, seems to have exceeded the limit in discussing an evasive answer by Mr. Alexander to a cross interrogatory on pages 61 to 64 of brief. H. B. Alexander and W. H. Bidwell were present and testified in person on the first trial, and claimed they had turned over to counsel for the company all documentary evidence they could find pertaining to the Dunken policies, but they did not testify that they produced reports or copies of reports to the

home office for the months of March, April and May, and in fact no such reports or copies were produced. In order that we might have the opportunity of asking Alexander about this, and some other matters, in preparing for the second trial, we refused to agree to read his evidence given on the first trial from the statement of facts; so plaintiff in error propounded interrogatories to him and we, in our cross interrogatories, asked him in substance: if it was not his duty to make monthly reports to the home office about the last of each month on all policies, and if he made such reports for the months of March, April and May, and if so, if he had copies of said reports, and what reference, if any, was made to the Dunken insurance. This question and its answer appear in full on page 86 of Record. We had not asked him anything about his February report; and had not asked him anything about the old policy. He failed to answer whether his reports for March, April and May made any reference to the new policy No. 152775 or not. These reports have never been produced. But in his effort to reflect on the Court of Civil Appeals of Texas, in discussing this evasion of the witness (page 62 of his Brief), counsel says: "And the learned court therefore seems to have discovered an artfully concealed motive that had completely escaped the attention of plaintiff's counsel." Let's see if there is any grounds for the above remark. This same matter was discussed in our brief on the second appeal of this case, and the Court of Civil Appeals in their opinion on that appeal (221 S. W. 694), said: "As has been stated, the vice-



president of the company instructed Mr. Alexander to report not later than March 31, 1916, on the new policy, and monthly reports were made by Alexander for March, April and May, but the contents of these reports are not in the record." Does it not necessarily follow, that, not only was there no grounds for the above thrust at the Court of Civil Appeals of Texas, but that counsel knew there were no grounds for said statement when he made it. More than a year elapsed before the case came on for the third and last trial, and still said reports were not produced nor their contents disclosed. We think the Court of Civil Appeals, on the last appeal, were fully justified in all they said on this matter.

10. Again on page 64 of brief, counsel for plaintiff in error, says: "On the first trial the written evidence which is now relied on as the *sole* support of the theory of waiver was offered by the company, and excluded by the court on plaintiff's objection \* \* \* On appeal the court held that these documents should be admitted 'as well as all other admissible evidence' on the issue of waiver" (204 S. W. 241-243). "The record here contains such documents, but no other evidence on this issue, admissible or otherwise, is found in the record, and the court is now driven to hold that these instruments mean precisely the opposite of what they state plainly, and precisely the opposite of what in legal effect the same court held on the first appeal." There are several things very peculiar about the above statement. Without any support in the record or in the opinion on the first appeal (204 S. W. 241-243), counsel is seeking

to have this court to accept his unsupported assertion that on the first trial: (1) that all the evidence, now claimed to show a waiver, was offered by plaintiff in error, (2) that it was objected to by defendant in error, (3) that it was excluded by the court, (4) that on the second trial it was again offered by plaintiff in error and admitted, and the Court of Civil Appeals of Texas held it was sufficient to sustain a finding of waiver (221 S. W. 691), (5) that on the third and last trial *plaintiff in error* offered this same evidence, which was admitted, and (6) that the Appellate Court of Texas on the second and third appeals held just the opposite to their holding on the first appeal. In other words, everybody connected with the case, except counsel for plaintiff in error, has been guilty of reversing himself, and that counsel for plaintiff in error has been guilty of introducing the evidence, which the Court of Civil Appeals had already held (221 S. W. 691) made out a case for defendant in error.

This all shows the extent to which counsel will go in his effort to cast some reflection upon the Court of Civil Appeals, and the Supreme Court of Texas, which has twice refused a writ of error in this case. The record does not disclose what the evidence was, which was excluded on the first trial, and neither does the opinion on the first appeal (204 S. W. 241-3), holding it should have been admitted.

The truth of the matter is, it was only the correspondence between secretary Newell, at the home office, and Howard E. Wright and state manager Alexander

at the Nashville Agency (see Exhibits 48, 49, 50 and 51, R. 110 and 111). It was no part of plaintiff's evidence showing the company waived the prepayment of the first premium on the new policy and delivered it as a completed contract, but was introduced by defendant as rebuttal evidence.

And counsel so far forgets himself, and the record, as to state: "The record here contains such documents, but no other evidence on this issue, admissible or otherwise, is found in the record," etc. The record here does contain these documents, but they constitute only a very small part of the entire transaction, all of which shows the new policy was delivered with the intention of its being effective on its receipt by the assured, and that such delivery was acquiesced in by an executive officer of the company, as found by the jury and also by the Court of Civil Appeals of Texas. This evidence is fully reviewed in our Brief, pages 9 to 52.

But counsel says further: "And the court is now driven to hold that these instruments mean precisely the opposite of what they state plainly, and precisely the opposite of what in legal effect the court held on the first appeal." Counsel evidently had forgotten that these instruments were not before the court on the first appeal, and, so the court did not and could not make any holding on them (204 S. W. 241). They were before the court on the second and third appeals, and there has never been any change in the holding of the court as to the effect of said instruments (221 S. W. 691, 248 S. W. 165).

### 11. Concluding Remarks.

That the state manager for Tennessee, delivered the new policy intending it to be an effective obligation on its receipt by the assured, can scarcely be doubted (see our Brief, R. 9 to 51, where the evidence is reviewed).

(2) The acts of said state manager, in so delivering said policy, were the acts of the company, regardless of attempted limitations on the acts of agents, as held by the Supreme Court of Texas in an unbroken line of decisions (see Authorities cited under first proposition, page 5 of our Brief).

(3) That the company, through its state manager, Alexander, on about March 6th, 1916, knew he had so delivered said new policy as a completed contract, cannot be denied (see the late case of *Manhattan Life Insurance Co. v. Stubbs* from the Supreme Court of Texas, cited in 234 S. W. 1099, where the Texas authorities are reviewed).

(4) That the company had *actual* knowledge it was so delivered on May 11, 1916 (R. 111), can not be questioned.

(5) That the company never at any time made any objections to such delivery, and never intimated to the assured or his family that it should be returned, or that it was not a valid contract, until after his death, which occurred June 1, 1916, is shown by all the evidence.

The presumption that it was properly delivered, and that the company intended to waive the prepayment of the first premium, both resulting from assured's possession of the policy at the time of his death, are not

only not rebutted by the company, but corroborated by the entire record.

*Jones v. N. Y. Life Ins. Co.*, 168 Mass. 245,  
47 N. E. 92.

*Am. Em. Ins. Co. v. Fordyce*, 36 S. W. 1051,  
54 Am. State Rep. 305.

*Berlinger v. Travelers Ins. Co.*, 121 Cal. 451,  
53 Pac. 922.

*Ins. Co. v. Ende*, 65 Tex. 118.

*Bankers Reserve v. Summers*, 242 S. W. 262.

The entire record in this case is a complete answer to the contention of counsel for plaintiff in error that his client was not given the benefit of "due process of law" or the "equal protection of law."

We respectfully pray that the writ of error herein be dismissed, or that the judgment of the state court be in all things affirmed.

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W. E. SPELL and  
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difference between the premiums then already paid and those required under the converted policy. The insured in due form exercised the option after he had become a citizen and inhabitant of Texas, and the converted policy was sent to him there. *Held*:

- (a) That the second policy was in effect but a continuation of the first and, like it, was controlled by the laws of Tennessee. P. 395.  
(b) That, in an action upon the second policy in Texas, where the insurance company was doing business when it issued, a Texas statute (Art. 4746, Rev. Civ. Stats. 1911,) imposing a penalty and allowing attorney's fees could not constitutionally be applied against the company, since a State cannot regulate business outside of her limits and control contracts made by citizens of other States, in disregard of their laws. P. 399.

248 S. W. 165, reversed.

ERROR to a judgment of the Court of Civil Appeals of Texas which affirmed a judgment for the amount of a life insurance policy, less certain offsets, together with a statutory penalty and attorney's fee. The Supreme Court of the State dismissed an application for a writ of error for want of jurisdiction.

*Mr. W. J. Moroney*, with whom *Mr. John R. Moroney* was on the brief, for plaintiffs in error.

*Mr. C. A. Boynton*, *Mr. W. E. Spell* and *Mr. J. A. Stanford*, for defendant in error, submitted.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is an action brought by the defendant in error upon a policy of insurance issued by the insurance company on the life of W. J. Dunken. The insurance company is a Connecticut corporation. When it issued the policy it was doing business in Texas under the laws of that State, of which Dunken then was a citizen and inhabitant.

The Texas statute provides:

"Any contract of insurance payable to any citizen or inhabitant of this state by an insurance company or cor-

poration doing business within this state shall be held to be a contract made and entered into under and by virtue of the laws of this state relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed, and the premiums and policy (in case it becomes a demand) should be payable without this state, or at the home office of the company or corporation issuing the same." Art. 4950, Rev. Civ. Stats., 1911.

The statute further provides that where loss occurs failure to make payment within thirty days after demand shall render the company liable to pay the holder of the policy in addition to the amount of loss twelve per cent. damages on the amount of such loss, together with reasonable attorney fees for the prosecution and collection thereof. Art. 4746.

These provisions, together with others, are declared to be conditions upon which foreign insurance companies shall be permitted to do business within the State and any such corporation engaged in issuing insurance policies within the State is deemed to have assented thereto as a condition precedent to the right to engage in such business. Art. 4972.

The policy in question was issued under the following circumstances: On December 17, 1910, H. B. Alexander, manager for the insurance company in the State of Tennessee, took the application of Dunken, then a resident of Tennessee, for a seven-year term policy. The policy was duly issued in Connecticut and delivered in Tennessee to Dunken. By its terms, at the sole option of the insured, upon any anniversary of its date, without medical reëxamination, it was convertible, among other forms of insurance, into a twenty payment life commercial policy, bearing the same date and issued at the same age, on payment of the difference between the premiums already paid and those required under the converted policy. On February



19, 1916, the seven-year policy still being in force, Dunker, in the meantime having moved to Texas, exercised his option and applied to the company for a conversion "in accordance with the conditions" of that policy just stated. His application stipulated that the statements and answers in the original application for the seven-year term policy should be the basis of the new policy and form a part of the same. The application was mailed to the Tennessee manager and by him forwarded to the home office of the company in Connecticut. There the old policy was cancelled, stamped "Surrendered; new number, 152,775; \$10,000", and a twenty payment life commercial policy, bearing the new number and conforming to the express terms of the agreement in the original policy, was issued and forwarded to Alexander in Tennessee for delivery. Alexander sent the policy by mail to Dunker at Waco, Texas, together with a loan note and a form authorizing the company to deduct the 1916 premium from the proceeds of the loan to be signed by him and returned. Dunker received these documents in due course of mail and retained the policy, but did not answer Alexander's letter, pay the premiums or execute the loan papers. Three months later he died. In the letter transmitting the policy Alexander fixed no time for the execution and return of the loan note and authority to deduct the 1916 premium; nor did he suggest that the delivery of the policy was in any way qualified. There was no further correspondence or notice of any kind from the company. It was agreed that the demand required by Article 4746 of the Texas statute, heretofore cited, was made by defendant in error. Judgment was rendered against the company for the amount of the policy less certain offsets, together with the statutory penalty of twelve per cent. and an attorney's fee of \$3,000, which judgment was duly affirmed by the Court of Civil Appeals. 248 S. W. 165. The Supreme Court of the State having dismissed an ap-

plication for a writ of error for want of jurisdiction, the writ of error here was issued to the intermediate court. *Randall v. Commissioners*, 261 U. S. 252.

The judgment below is challenged upon these grounds:

(1) The policy as shown by the undisputed evidence never became a completed or binding contract; (2) it was a Tennessee or Connecticut contract and, since under the laws of those States no penalty or attorney's fee was recoverable, the Texas statute as construed and applied, violates the contract impairment clause, the full faith and credit clause, and the several clauses of § 1 of the Fourteenth Amendment of the Federal Constitution; and (3) assuming it to be a Texas contract, plaintiff having demanded and sued for substantially more than she recovered, the suit was rightfully defended and the statute as construed and applied to that situation violates the same provisions of the Federal Constitution.

Defendant in error moves to dismiss the writ of error or affirm the judgment of the state court upon the ground that the asserted federal questions are so lacking in substance as to be frivolous. This motion must be denied. Other matters aside, the contention that the contract is controlled by the law of Tennessee or Connecticut—in which event the Texas statute in respect of penalty and attorney's fee as construed and applied, is unconstitutional—clearly presents a substantial question under the full faith and credit clause of the Constitution. *Royal Arcanum v. Green*, 237 U. S. 531, 540, 541. See also, *New York Life Ins. Co. v. Head*, 234 U. S. 149, 159-160. And the cause is properly here on writ of error, under § 237 of the Judicial Code as amended September 6, 1916, c. 448, 39 Stat. 726. *Kansas City So. Ry. Co. v. Road Imp. Dist. No. 6*, 256 U. S. 658.

*First.* Coming then to the merits, the first contention to be considered presents a pure question of fact, which

was decided against plaintiffs in error by the jury in response to specially submitted issues. Upon these issues the jury found that the new policy was delivered by an agent of the insurance company as a completed contract with the intention that it should become effective and binding from the time of its receipt by Dunken; and that such delivery as a completed contract was acquiesced in by an executive officer of the company. This verdict met with the concurrence of the trial court and, after a full review of the evidence, of the appellate court. The rule is settled that the decision of a state court upon a question of fact ordinarily cannot be made the subject of inquiry here. See for example, *Missouri, K. & T. Ry. Co. v. Haber*, 169 U. S. 613, 639; *Smiley v. Kansas*, 196 U. S. 447, 453-454. To this general rule there are two equally well settled exceptions: "(1) Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 593, and cases cited. See also *Truax v. Corrigan*, 257 U. S. 312, 324-325. This case comes within the general rule and not within either of the exceptions. The fact decided is that the policy sued upon was delivered as a completed and binding contract. The federal question presented arises from the ruling of the court that the Texas and not the Tennessee statute controls this contract. The asserted federal right was not denied as a result of the finding of fact; nor are the conclusion in respect of the federal right and the finding interdependent or so intermingled as to cause it to be necessary to consider the latter in order to pass upon the former. That the contract was effective is a fact equally consistent with the determination of the federal question either way.

*Second.* The argument that the policy was not a Texas contract proceeds upon two grounds: (a) that the converted policy became effective, if it ever did, when it was mailed by the company's agent in Tennessee; (b) that the original policy was clearly a Tennessee or Connecticut contract, and the converted policy, being executed under the optional privilege granted by the original contract and in exact compliance with its terms, is a subsidiary and not an independent agreement, and the rights and obligations of the parties are controlled by the law of the original contract.

We proceed at once to the consideration of the second ground, since if that is well founded it will be unnecessary to consider the first. Whether a subsequent contract made in pursuance of the provisions of an earlier one is to be regarded as separate, detached and independent, or as a continuation and in effect the same, is a matter not always free from difficulty. The question as applied to substituted policies of insurance has not heretofore arisen in this Court and apparently has seldom arisen in the state courts. In *Dannhauser v. Wallenstein*, 169 N. Y. 199, 208, where a ten payment life policy provided that after the payment of two or more equal premiums, notwithstanding default in payment of subsequent premiums, the company would grant a paid-up policy for a proportionate part of the original amount of the policy, it was held that such paid-up policy when issued was not an independent contract. The court said:

"It was simply a continuation of the original contract under the option which gave the holder thereof the right, after two or more annual premiums had been paid, to cease paying the annual premiums and take a paid-up policy in exchange for the first one. It was a change in the mere form of the contract expressly provided for by its own terms. It is true that the first policy, the original evidence of the contract between the insured and the com-

pany, was 'surrendered to the company and canceled' when the paid-up policy was issued, but this was simply a part of, and in compliance with, the terms of the original contract. The contract was continued as it provided that it might be, in the form of a paid-up policy, such as was accepted by the defendant. It was not a modification, but a fulfillment of the original contract."

The facts were held to justify an opposite conclusion in *Gans v. Aetna Life Ins. Co.*, 214 N. Y. 326. There the original policy contained a provision to the effect that if the insured should commit suicide within one year from the date thereof the policy should be void. It allowed, among other options, an exchange for another policy bearing the same date upon payment of a sum equal to the difference between the premiums actually paid and those which would have been earned by the substituted policy. The substituted policy, however, bore the date of its issue and by its terms the suicide provision ran for "one year from the date hereof." It was contended that, since the assured might have exercised his option so as to have made the date of the original policy the date of the substituted policy, the option actually exercised should be construed to that effect. But the court replied that, the parties having agreed that the date of the new policy should be that of its issue and so made it, and the premium payable being adapted to the kind of policy selected and to the then insuring age of the assured, it must be held to be an independent contract to be construed without reference to the options not exercised.

Under different circumstances the same question came before the Supreme Court of Tennessee, in *Silliman v. International Life Ins. Co.*, 131 Tenn. 303. There a five-year term policy provided that the insured might at any premium date exchange it for any form of policy then in use at the premium fixed by his age at the time of the exchange or at the age in the original policy by paying the



difference in premiums, etc. The policy contained a provision to the effect that in case of suicide within one year from its date the company should be liable only for the amount of the premiums paid. Four years later the insured demanded another form of policy and the exchange was made on the old application and medical examination, the terms of the second policy being in strict accord with the obligations of the first policy. The new policy limited the right of recovery in case of suicide "within one year from the date on which this insurance begins." Six months after the change of policies, insured committed suicide. The Tennessee court held that the two policies were in effect one and the same contract, and that the insurance began within the meaning of the suicide clause in the second policy at the time the first policy was issued, since the dominant purpose of the parties was to carry out the provisions of the contract contained in that policy. That time having run before the exchange, the clause was rejected as surplusage. The *Gans Case* was distinguished upon several grounds, and especially upon the ground that there was nothing to show that the second Tennessee policy was an independent, complete and isolated contract, unconnected with the first policy; but on the contrary that it was expressly shown that they were connected, "and that the second was issued because of and in compliance with the requirements of the first." See also, *McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala. 401, 412-415; *People v. Globe Mutual Life Ins. Co.*, 15 Abbott's N. C. 75; *Barry v. Brune*, 71 N. Y. 261, 268.

While this Court has not passed upon the precise question here presented, it had before it an analogous question in *New York Life Ins. Co. v. Dodge*, 246 U. S. 357, and *Mutual Life Ins. Co. v. Liebing*, 259 U. S. 209. The *Dodge Case* dealt with an insurance policy issued in Missouri to a resident and citizen of Missouri by a New York corporation with a Missouri license. The policy provided

that "cash loans can be obtained by the insured on the sole security of this policy on demand at any time after this policy has been in force two full years," etc. It was provided that application for any loan should be in writing and that the loan would be subject to the terms of the company's loan agreement. Under this provision the insured procured a loan at the home office of the company in New York City, hypothecating the policy there as security. The loan agreement declared that it was made and to be performed in New York and under and pursuant to the laws of that State. Upon failure of the insured to pay a premium the entire reserve of the policy was applied to satisfy the loan and thereupon all obligation ceased under the provisions of New York law. The insured having died, suit was brought by the beneficiary upon the policy in reliance upon the Missouri nonforfeiture statute (Rev. Stats., 1899, § 7897), by the terms of which, unlike the New York statute, the insurance would have continued in force. This Court held that while the policy was clearly a Missouri contract the loan agreement was an independent contract made in New York and subject to New York law. In the course of the opinion it is said (p. 373):

"It should be noted that the clause in the policy providing 'cash loans can be obtained by the insured on the sole security of this policy on demand, etc.,' certainly imposed no obligation upon the company to make such a loan if the Missouri statute applied and inhibited valid hypothecation of the reserve as security therefor as defendant in error maintains. She cannot, therefore, claim anything upon the theory that the loan contract actually consummated was one which the company had legally obligated itself to make upon demand."

The decision proceeds upon the theory that the provision in respect of loans did not constitute an absolute promise to make a loan upon simple demand at all events;



and that the loan contract was an independent, subsequent agreement made in another State. In the *Liebing Case*, subsequently decided, the policy executed in Missouri provided that "the company will . . . loan amounts within the limits of the cash surrender value," etc., and this Court, pointing out that the language of the policy in the *Dodge Case* was "cash loans can be obtained," etc., said (pp. 213-214):

"The policy now sued upon contained a positive promise to make the loan if asked, whereas in the one last mentioned [the *Dodge Case*] it might be held that some discretion was reserved to the company."

In the light of these decisions, then, we inquire whether the second policy issued to Dunken is to be controlled by Tennessee or Texas law. The contract contained in the original policy was a Tennessee contract. The law of Tennessee entered into it and became a part of it. The Texas statute was incapable of being constitutionally applied to it since the effect of such application would be to regulate business outside the State of Texas and control contracts made by citizens of other States in disregard of their laws under which penalties and attorney's fees are not recoverable. *New York Life Ins. Co. v. Head*, 234 U. S. 149; *Overby v. Gordon*, 177 U. S. 214, 222. The second policy here was issued in pursuance of, and was dependent for its existence and its terms upon, the express provisions of the contract contained in the first one. By those provisions, upon the simple application of the insured, the new policy must issue. Nothing was left to future agreement. The terms of the new policy were fixed when the original policy was made. In effect, it is as though the first policy had provided that upon demand of the insured and payment of the stipulated increase in premiums that policy should, automatically, become a twenty payment life commercial policy. It was issued not as the result of any new negotiation or agreement but

AETNA LIFE INSURANCE COMPANY ET AL. v.  
DUNKEN, ADMINISTRATRIX OF DUNKEN.

ERROR TO THE COURT OF CIVIL APPEALS OF THE THIRD  
SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 62. Argued October 14, 1924.—Decided December 15, 1924.

1. A finding of a state court that a contract was completed,—a pure question of fact,—*held* not reviewable by this Court where the federal right involved depended on the legal question whether, the contract being completed, rights and obligations under it were governed by a local statute or the laws of another State. P. 393.
2. A seven-year term policy, issued by a life insurance company in Connecticut and delivered to the insured in Tennessee where he resided, provided that, at the sole option of the insured, upon any anniversary of its date, without medical reexamination, it was convertible into a twenty payment life commercial policy, bearing the same date and issued at the same age, on payment of the

in discharge of preëxisting obligations. It merely fulfilled promises then outstanding; and did not arise from new or additional promises. The result in legal contemplation was not a novation but the consummation of an alternative specifically accorded by, and enforceable in virtue of, the original contract. If the insurance company had refused to issue the second policy upon demand, the insured could have compelled it by a suit in equity for specific performance. See *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390, 405.

From these premises it necessarily results that the second policy follows the status of the first for which it was exchanged, and is not subject to the Texas statute relating to penalties and attorney's fees but is controlled by Tennessee law. The judgment below, therefore, in so far as it gives effect to the Texas statute by imposing a penalty of twelve per cent. and allowing attorney's fees, is erroneous, in that the Texas statute cannot constitutionally be applied to a Tennessee contract.

**Third.** This conclusion renders it unnecessary to consider the third contention urged as ground for reversal.

The judgment below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

**Reversed.**